153 U.S. 614

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1080.

HENRY STARR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED DECEMBER 12, 1893.

(15464.)

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a United States of America, western district of Arkansas.

Pleas and proceedings before Hon. I. C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court, in the case of—

THE UNITED STATES
vs.
HENRY STARR. } Indictment for murder.

1 *Indictment.*

United States of America, western district of Arkansas.

In the circuit court, August term, A. D. 1893.

UNITED STATES
vs.
HENRY STARR. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Henry Starr, on the 13th day of December, A. D. 1892, at the Cherokee Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Floyd Wilson, a white man and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Henry Starr with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he, the said Henry Starr, in his hands then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said Floyd Wilson; and that the said Henry Starr with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Henry Starr discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Floyd Wilson, in and upon the left side of the breast of him the said Floyd
2 Wilson, giving to him, the said Floyd Wilson, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Henry Starr in and upon the left side of the breast of him, the said Floyd Wilson, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he, the said Floyd Wilson, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Henry Starr, him, the said Floyd Wilson, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Indorsed on back:) No. 74. United States vs. Henry Starr. A true bill. I. W. Bruce, foreman. Witnesses, Arthur Dodge, 7 miles N. of Nowata, I. T.; Frank McGirl, 5 miles S. of Lanopah, I. T.; Emmit Miller, 8 miles S. of Lanopah, I. T.; Mary Patchett, 7 miles N. of Nowata, I. T.; John T. Patchett, 7 miles N. of Nowata, I. T.; Henry C.
3 Dickey, St. Louis, Mo.; Sam Childers, Sapulpa, I. T.; Sam Wilson, Little Rock, Ark.; Wm. Cowden, Coffeeville, Kan.; Arthur Johnson; J. J. Kelly Fort Smith, Ark.; Clarence Owensby, Fort Smith, Ark.; Julius Orlick, Fort Smith, Ark. Filed in open court, Aug. 8, 1893. S. Wheeler, clerk. By I. M. Dodge, D. C.

4 *Record entries.*

In the circuit court of the United States for the western district of Arkansas, August term, 1893. Wednesday morning, 8½ o'clock, Aug. 9th, 1893.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES
vs.
HENRY STARR. } Indictment for murder, No. 74.

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, and having had hearing of said indictment, and it being demanded of him concerning said indictment above specified, and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment, and puts himself upon the country.

Whereupon, by agreement of parties, this cause is set down for trial October 16, 1893.

Thursday, Oct. 5, 1893.

(Caption omitted.)

On this day come the said defendant, by his attorneys, and files his application in writing, verified upon oath, praying for witnesses in his behalf at the expense of the United States. Said application coming on to be heard and the court being well and sufficiently advised in the premises, doth allow the same.

It is therefore ordered that the legal expense of procuring the
5 testimony of Lizzie Lipsey, David Beach, George Beach, and Joshua Kent, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them returnable Oct. 16, 1893

Tuesday, Oct. 17, 1893.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal, and by his attorneys, W. H. H. Clayton, esq., Wm. M. Cravens, esq., and Thos. H. Barnes, esq.; and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors, as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore, and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue joined. Whereupon, after counsel for both plaintiff and defendant had exercised, in the presence of the defendant, their full right of challenge, under the law, the following were selected for the trial of this cause, to wit: Thos. W. Bridges, John A. Card, David C. Jones, James A. Lane, Wm. A. Lowery, John H. Norris, Stephen C. Thornton, Elmer E. Williams, Wm. T. Yaden, Stonewall J. Kirkes, Paul Euper, Calvin M. Williams, twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict ren-
6 der according to the law and the evidence, and after hearing a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

And it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

Wednesday, Oct. 18, 1893.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, W. H. H. Clayton, esq., Wm. M. Cravens, esq., and Thos H. Barnes, esq.; and now come the jury heretofore empaneled for the trial of this cause: Thos. W. Bridges, John A. Card, David C. Jones, James A. Lane, Wm. A. Lowery, John H. Norris, Stephen C. Thornton, Elmer E. Williams, Wm. T. Yaden, Stonewall J. Kirkes, Paul Euper, Calvin M. Williams, who took their seats in the jury box, and, after hearing the remainder of the evidence and a portion of the argument of counsel, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

Thursday, Oct. 19, 1893.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read,
7 esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, W. H. H. Clayton, esq., Wm. M. Cravens, esq., and Thos. H. Barnes, esq.; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Thos. W. Bridges, John A. Card, David C. Jones, James A. Lane, Wm. A. Lowery, John H. Norris, Stephen C. Thornton, Elmer E. Williams, Wm. T. Yaden, Stonewall J. Kirkes, Paul Euper, Calvin M. Williams, who took their seats in the jury box, and, after hearing the remainder of the argument of counsel and receiving the charge of the court, retired in charge of the sworn bailiff aforesaid, to consider of their verdict.

Friday, Oct. 20, 1893.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, W. H. H. Clayton, esq., Wm. M. Cravens, esq., and Thos. H. Barnes, esq.; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Thos. W. Bridges, John A. Card, David C. Jones, James A. Lane, Wm. A. Lowery, John H. Norris, Stephen C. Thornton, Elmer E. Williams, Wm. T. Yaden, Stonewall J. Kirkes, Paul Euper, Calvin M. Williams, who returned into court the following verdict, to wit:

"We, the jury, find the defendant, Henry Starr, guilty of murder, as charged in the within indictment.

(Signed) "JOHN H. NORRIS,
"*Foreman.*"

Whereupon, on motion of defendant by his attorneys, the jury
8 was polled, and each juror answered for himself that the verdict as read by the court was his verdict.

Thereupon the jury was by the court discharged from the further consideration of the case and the said defendant remanded to the custody of the marshal to await final sentence.

Wednesday, Nov. 1*st*, 1893.

(Caption omitted.)

On this day come the said defendant in person and through his attorney, Wm. M. Cravens, esq., files his motion to set aside the verdict of the jury and for a new trial in this cause.

Saturday, Nov. 4, 1893.

(Caption omitted.)

On this day come on for final hearing the motion heretofore filed by the defendant to set aside the verdict of the jury and for a new trial in this cause. And the court, being well and sufficiently advised in the premises, doth overrule said motion. To which said ruling of the court the defendant, by his counsel, excepted.

(Caption omitted.)

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant, Henry Starr, was brought to the bar of this court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause, on the 20th day of October, 1893, shall not now be pronounced
9 against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said Henry Starr be deemed, taken, and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of the district aforesaid cause the said Henry Starr to be taken hence, and him, the said Henry Starr, safely and securely keep, from the date hereof until Tuesday, the 20th day of February, A. D. 1894, and on that day, and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Henry Starr to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Tuesday, the said 20th day of February, in the year of our Lord one thousand eight hundred and ninety-four, cause the said Henry Starr to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

(Caption ommitted.)

Ordered by the court, that defendant have until Nov. 14, 1893, in which to file his bill of exceptions herein.

10 *Nov. term,* 1893, *Tuesday, Nov.* 14, 1893.

(Caption omitted.)

Comes the defendant, in custody of the marshal, and by one of his attorneys, Wm. M. Cravens, esq., and tenders his bill of exceptions, and asks that the same be signed and made a part of the record in this case,

which is accordingly done, and defendant is granted until Nov. 20th, 1893, to file assignment of errors and petition for writ of error to take this case to the Supreme Court.

Saturday, Nov. 18, 1893.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his assignment of errors and petition for a writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

11 *Wednesday, Dec.* 6, 1893.

(Caption omitted.)

On this day comes the clerk of this court and makes known to the court that a writ of error taking this case to the Supreme Court of the United States has been issued by the clerk.

It is, therefore, hereby ordered by the court that execution of sentence heretofore pronounced in this cause be stayed, pending the action of the Supreme Court.

Considering the gravity and importance of this case and it appearing to the satisfaction of the court that because of the great length of the assignment of errors, of the extent to which it goes in setting out the charge, and of the fact that very much of it is but a fragmentary statement of the charge, much of it, as well as the motion for a new trial, is a statement of the charge different from what it is when taken together, and the court believes it impossible for the Supreme Court to know what the charge of the court was unless the whole of it is put in the bill of exceptions, that it may be examined by the Supreme Court—

It is, therefore, hereby ordered that the clerk of this court put the whole of said charge in the bill of exceptions, and it is further ordered that the whole of the evidence offered and admitted in the trial of the case be put in the bill of exceptions.

12 *Bill of exceptions.*

UNITED STATES OF AMERICA.

In the circuit court of the United States for the western district of Arkansas, August term, A. D. 1893.

UNITED STATES
vs.
HENRY STARR. } Murder.

Be it remembered, that on the day of October, A. D. 1893, the same being a day of the August term of the United States circuit court for the western district of Arkansas, come on to be heard the above-styled cause, when the following proceedings were had, to wit:

Mathew E. Boyd, James Bill, Thomas W. Bridges, William A. Carrollton, John A. Cord, Jasper H. Curnutt, Jerry M. Cravens, Miles Clay, Thomas P. Davis, Charles S. Delaney, Joseph A. Fuller, and William I.

Harlan, twelve gentlemen of the panel of jurors, summoned to serve for the August term, 1893, were called into the box and sworn to truthfully answer questions as to their qualification to serve as jurors on this case. The aforesaid juror, James Bill, stated that he had conscientious scruples about inflicting the death penalty; in answer to the question as to whether he had such conscientious scruples against the death penalty as that he would refuse to convict in a case where the punishment is death, provided that he was satisfied beyond a reasonable doubt, from the law and the evidence, that the defendant was guilty, said, I would not convict on circumstantial evidence alone; I would want an eye-witness to
13 the killing. If there were an eye-witness to the killing and the other evidence, although only circumstantial, enough to satisfy me of the defendant's guilt, I would convict. I would not convict wholly upon circumstantial evidence." Mr. Clayton, of counsel for defendant, stated that it was known to the district attorney that in this case there were four or five eye-witnesses to the killing, and that therefore from the statement of the juror he would not be disqualified, but the court held that he was disqualified, and excused the juror for cause, because it could not be known to the court at this stage of the case that there were any eye-witnesses, and as that there is necessarily one part of every murder case, the intent with which the killing was done, that must be proved by circumstantial evidence, that therefore the juror James Bill was disqualified. To which ruling of the court and the rejection of the said juror over the objection of the defendant the defendant at the time excepted. The court then excused for cause the aforesaid juror of the panel; also excused for cause Jerry M. Cravens and Miles Clay, and thereupon William W. Hensley, Counsel L. Hart, and Thomas W. Hamlin, gentlemen of the panel, were called into the box, and sworn to answer questions touching their qualifications as jurors to serve in this case, whereupon the following questions were put to and answers made by the juror Thomas W. Hamlin:

The DISTRICT ATTORNEY. Have you formed or expressed any opinion in this case?

A. I have not.

Q. Have you any prejudice or bias for or against the defendant?

A. No, sir.

Q. Are you related to him in any way?

A. No, sir.

14 Q. Were you related to Floyd Wilson, the deceased?

A. No, sir.

Q. Have you any conscientious scruples about returning a verdict of guilty in a case where the punishment would be death, if the law and the facts warranted it?

A. Yes, sir; I have.

Q. You have conscientious scruples then about the infliction of the death penalty?

A. Yes, sir.

The COURT. Are they of such a character as to prevent your being governed by the law and the evidence?

A. I would have to know there was an eye witness—a man who saw him killed.

Q. You would not be willing to convict upon any other testimony than positive evidence?

A. No, sir.

The DISTRICT ATTORNEY. I understood you to say that you had conscientious scruples about returning the death penalty?

A. I have, in regard to breaking a man's neck—hanging him.

Mr. CLAYTON (of counsel for defendant). Conscientious scruples are not sufficient, I believe. You have answered the court that unless there was an eye witness to the killing you would not be willing to convict. If there was an eye witness, and then the other testimony in connection with that satisfied you it was a malicious killing, would you be willing to return a verdict of guilty after the killing is proven?

A. Mr. Bill was excused on the same ground.

Q. We have got to get your mind. You have stated to the court there must be an eye witness to the killing. Now, suppose there was an eye witness to the killing, and then there was circumstantial testimony tending to show and to satisfy you that it was a malicious killing?

A. I would be willing, if there was circumstantial evidence connected with the eye witness; I would be willing then.

15 The COURT. What you would require would be the statement of an eye witness?

A. I would not want circumstantial evidence unless there was a man that seen it.

The DISTRICT ATTORNEY. Let me ask the juror this question, if your honor please: If there was an eyewitness to the killing, but it required circumstantial evidence to prove other elements of the crime, would you then convict?

A. Certainly I would.

The COURT. But you would not be willing to convict on circumstantial evidence alone?

A. No, sir; I would not.

The COURT. The court can not tell what sort of evidence is in this case. We must pass on the qualifications of this juror as he now stands without any knowledge of the case. We can not pass on the qualification of a juror with the anticipation that the evidence may be of such and such a character in any case. (To the juror:) Are the views you have on capital punishment of such a character as to require greater evidence than if you did not entertain these views?

A. I have conscientious scruples about entering upon——

The COURT. Are these scruples of such a character as to cause your judgment to be influenced or biased or to prevent you from finding a verdict of guilty if the evidence proved the case beyond a reasonable doubt?

A. No, sir.

The COURT. They are not?

A. No, sir.

The COURT. If the evidence of either character, positive or circumstantial evidence, or both combined, should show the killing and all the requisites that go to make the crime—intent and malice aforethought—beyond a reasonable doubt, would you be willing to convict notwithstanding your scruples upon the subject of capital punishment?

16 A. Yes, sir; circumstantial evidence connected with eyewitnesses of course would be perfectly sufficient.

The COURT. Suppose the testimony all combined, no matter whether it was circumstantial or positive, was equal in proving power to the testimony of one positive, credible, uncontradicted eyewitness, you would be willing to convict upon the testimony that went to that extent.

A. Yes, sir; circumstantial evidence may be sufficient, but it would seem——

The COURT. We do not want any argument. You must answer the question. I will put it again: If all the evidence in the case was equal in proving power to what would be the testimony of one positive, credible, uncontradicted eyewitness, would you upon testimony which proved the case to that extent be willing to convict upon it notwithstanding your convictions on capital punishment?

A. Yes, sir.

The COURT. I think the gentleman is qualified.

Mr. CLAYTON (of counsel for defendant). Have you read the papers with regard to Mr. Starr, the defendant in this case?

A. No, sir—well, I have read some little about it.

Q. Enough to prejudice you in any way against him?

A. No, sir.

Q. Have you read this morning's Times?

A. No, sir.

The COURT. What do you say as to these twelve men upon the part of the Government, gentlemen?

The DISTRICT ATTORNEY. We excuse Mr. Boyd.

Whereupon Henry F. Hill, of the panel, was called into the box, questioned, and found to be qualified, and was peremptorily challenged
17 by the district attorney; whereupon Richard Johnson, of the pane, was called into the box, sworn, questioned, and found to be qualified. The district attorney then accepted the twelve men in the box, and the twelve jurors left in the box, found qualified by the court and unchallenged by the Government, were presented to the defendant for his peremptory challenges whereupon he, the defendant, peremptorily challenged William A. Carrollton, Jasper H. Curnutt, Thomas P. Davis, Charles S. Delaney, Joseph A. Fallin, William I. Harlan, William W. Hensley, Counsel L. Hart, and Richard Johnson, leaving in the box accepted by him and the district attorney Thomas W. Hamlin and two others; whereupon nine other gentlemen of the panel were called into the box, sworn to answer questions, and all found by the court to be qualified save one, who was excused by the court for cause; whereupon Henry W. Stoddard, a gentleman of the panel, was called into the box, sworn to answer questions, and found qualified. The district attorney then announced to the court that the twelve jurors in the box were good for the Government and accepted them; whereupon the nine men last called into the box were presented to the defendant for his peremptory challenges, and George W. Lipps, Samuel G. McGruder, John L. Smith, Jacob Schlaefli, and Henry W. Stoddard, of the nine men last called into the box, were peremptorily challenged by the defendant, leaving selected seven jurors, among whom was Thomas W. Hamlin, of the first twelve called; whereupon Simon

Sevier and four other members of the panel were called into the box; whereupon the following questions were put to and answers made by the said Simon Sevier:

The DISTRICT ATTORNEY. This is the case of the United States vs. Henry Starr, charged with the murder of Floyd Wilson. Have you formed or expressed any opinion in this case?

A. No, sir.

18 Q. Have you any bias for or against the defendant or any prejudice either way?

A. No, sir.

Q. Are you related to the defendant in any way?

A. No, sir.

Q. Were you related to the deceased, Floyd Wilson?

A. No, sir.

Q. Have you any such conscientious scruples as would prevent your returning a verdict of guilty in a case where the punishment is death if the law and the evidence warranted such a verdict?

A. Only this: I am not altogether agreeable with capital punishment. I would not like to send him to capital punishment.

Q. You mean you do not believe in capital punishment?

A. That is a hard question. I could not say that I believe in it.

The COURT. Are your views of such a character as to interfere with your conclusions. After you heard the law and the evidence and it was sufficient to satisfy you beyond a reasonable doubt of guilt, would you find the party guilty of the crime of murder if it was to be followed by capital punishment?

A. I could do it, but I would be afraid of the hereafter—my own conscience; that is all; it would grind on me a little.

The COURT. The question is whether or not it would influence or bias your judgment after you had heard the law and the evidence?

A. No, sir; it would not.

The COURT. Would you convict if the testimony in the case proved the case in that way that the law requires it to be proven. Would you be governed by the law and the evidence in the case of that kind and convict notwithstanding your views on the subject?

A. Well, of course, it looks like if I was a law-abiding man I would have to do it.

19 The COURT. You are a law-abiding man?

A. Yes, sir.

The COURT. That is, you are willing to be governed by the law and the evidence in the case?

A. Yes, sir.

The COURT. You would be governed by the law and the testimony?

A. Yes, sir.

The COURT. Of course, it is expected that gentlemen are answering honestly in these matters, and not for the purpose of shirking their duties. They have a right to their views, but they must give them as they have them, and not put themselves in an attitude where they may be rejected by one side or the other, or by the court, because of their views when that is not the case. I want to admonish you as to that. (To the juror.) Now, I will ask you again, whether or not, after you have heard the law

and the evidence in the case, and that established guilt beyond a reasonable doubt of the defendant, would you convict of the crime of murder, such conviction being followed by capital punishment?

A. (After a pause.) I would hate to do it.

The COURT. You must make answer what you would do.

A. The evidence would have to be mighty clear.

The COURT. Well, I have told you how clear the law says it must be—that is, proved beyond a reasonable doubt, so as to satisfy a reasonable man upon a matter of great importance. That is how clear the law says it must be.

A. I propose to be reasonable, but it looks to me like I would have to have eye witnesses and good circumstantial proof before I could consider it.

Mr. CLAYTON (of counsel for defendant). Will your honor permit me to ask the juror a question?

The COURT. Yes.

20 Mr. CLAYTON (of counsel for defendant). Suppose in the trial of this case, or any other case, for murder, that the evidence should be sufficiently strong to satisfy you of the fact that the man was guilty beyond a reasonable doubt under your oath, after you had been sworn as a juror to return a verdict in accordance with the law and the evidence, if the law and the evidence satisfied your mind that he was guilty under that oath, notwithstanding the death penalty, would you be willing to return a verdict of guilty against him, having taken an oath you would return such a verdict?

The COURT. And that verdict to be followed by capital punishment?

Mr. CLAYTON (of counsel for defendant). Yes; and that verdict to be followed by capital punishment?

A. Yes, sir; I think it would be binding; I would have it to do.

The COURT. I will ask you again, whether or not your views upon the subject of capital punishment would interfere or bias your judgment to such an extent as you would be unwilling to convict if the case was proven beyond a reasonable doubt?

A. I am afraid it would.

The COURT. The court decides the juror is disqualified.

Mr. CLAYTON (of counsel for defendant). We think that the juror is qualified, and desire to save an exception to the ruling of the court.

The COURT. Yes; you can save an exception to the ruling of the court.

Whereupon the following questions were put to and answers made by the said Edward Taylor:

The DISTRICT ATTORNEY. Have you formed or expressed any opinion in this case?

A. I have, sir.

21 Q. From what did you form that?

A. From hearing of the case and reading it afterwards when it was first committed.

Q. Do you mean this case for the killing of Floyd Wilson?

A. Yes, sir.

Q. Would it require evidence to remove the impression you now have as to the guilt or innocence of the defendant?

A. Well, I have not really any prejudice about the case whatever. Of course, hearing of the case, it made me form some opinion as to what the case was.

Q. Well, notwithstanding that opinion, could you go into the jury box and give the defendant a fair trial?

A. Yes, sir; I could.

The COURT. You do not think what you have heard would influence or bias your judgment after you had heard the law and the evidence in the case, but you would be governed by the law and the testimony?

A. Yes, sir; I would be governed by the law and the testimony.

Q. And that would not bias your judgment or influence it at all?

A. It would not.

The DISTRICT ATTORNEY. Have you any such conscientious scruples against capital punishment as would prevent your returning a verdict of guilty in a case where the law and the evidence warranted it, such verdict to be followed by capital punishment?

A. Yes, sir.

Examination by defense:

Mr. CLAYTON (of counsel for defendant). You say you read about this matter?

A. Yes, sir.

Q. And that you formed an opinion?

A. Yes, sir; I did at the time.

Q. Now, you remember what you read, I suppose?

A. I do not know as I could repeat it all over.

Q. If the evidence in the case should turn out to be the same as you read it, then you have a preconceived opinion with regard to the matter,

22 haven't you?

A. Yes, sir; if it would turn out to be the same as I looked at it at that time.

Q. You remember now you formed an opinion, do you?

A. Yes, sir.

Q. Have you that opinion still?

A. To a certain extent I have.

Q. Very well; now, then, you have?

A. Yes, sir.

Q. Would it take evidence to remove that opinion?

A. Yes, sir; evidence would change my mind.

Q. It would take evidence to change your mind, would it not?

A. Yes, sir.

Q. That is the only way you can get rid of that opinion, is it not, that you have now formed; would be evidence, would it not?

A. Yes, sir, certainly; of course it would be the only way.

Q. Then you start in with the case with an opinion against the prisoner?

A. I did not say that I had any opinion against the prisoner.

Q. Well, for him then. It might be for him, might it not?

A. It might be.

Q. You won't say. We won't ask you as to that. I suppose I would have a right to know if I wanted to, but we are not particular about knowing it. But whatever way it is it would require evidence to remove that opinion, would it not?

A. Yes, sir; to this extent, colonel, the newspapers were all full of it all the time. There is no man but what forms some opinion from what a

paper states. I would have to hear facts in the case as a juror to be changed in my mind as to what the papers said about it.

Q. You would have to hear facts in order to change your opinion you formed at that time?

A. Yes, sir.

Q. It would take some evidence to change you' opinion?

A. Yes, sir.

23 Mr. CLAYTON (of counsel for defendant). We submit to the court that the gentleman is disqualified as a juror in this case.

The COURT. Can you go into the jury box and try the case by the law and the testimony?

A. Yes, sir.

Is any opinion you have formed of such a character as to influence or bias your judgment in the least after you have heard the law and evidence?

A. I think not.

Q. No opinion that would prejudice or bias your judgment upon what you have read?

A. No, sir.

Q. After you have heard the law and the evidence?

A. No, sir.

Q. You would be controlled exclusively by the law and the testimony in the case?

A. Yes, sir; I would.

The COURT. I think the juror is qualified.

Mr. CLAYTON (of counsel for defendant). We challenge him for cause, and save an exception.

The COURT. Yes, sir.

The court overruled the defendant's challenge for cause, to which action of the court in overruling the said defendant's challenge and in declaring the said Taylor to be a qualified juror to sit in this case the defendant at the time excepted; whereupon two other members of the panel last called into the box were declared to be disqualified by the court and then three other members of the panel were called into the box, sworn to answer questions as to their qualifications and were found to be qualified. The district attorney then announced that the last five members of the panel so found to be qualified jurors by the court were good for the Government,

and were accepted by him, and they were then presented to the de-

24 fendant for his peremptory challenges, and the defendant peremptorily challenged the said Edward Taylor and one other of the gentlemen thus presented to him, leaving ten men in the box selected as aforesaid; whereupon two other members of the panel were called into the box, sworn to answer questions, and upon examination were found by the court to be disqualified; whereupon two other members of the panel were called into the box, sworn to answer questions, and upon examination were found to be qualified, but before the district attorney passed upon his peremptory challenges as to the last named gentlemen called into the box, he, the district attorney, called up the aforesaid Thomas W. Hamlin, one of the first gentlemen called into the box, and one of the three who were

first declared by the district attorney to be good, and chosen by both the district attorney and the defendant as aforesaid, and the following questions were asked him and answers made, to wit:

The DISTRICT ATTORNEY. I disire to ask Mr. Hamlin some further questions. What was your answer to the question as to whether or not you would convict of capital punishment in a case where the law and the facts warranted a conviction of guilt? Did I understand you to say you would convict or would find a verdict of guilty where the law and the facts warranted it, if the punishment was death?

A. I said before that I was opposed to capital punishment; that I was opposed to breaking a man's neck; that is the way I said it. You asked me the question if there was an eye witness and circumstantial evidence connected with it to prove a man's guilt if I would convict him, and then I told you I would.

Q. I don't think you understand. If the evidence in the case was sufficient to convince your mind beyond a reasonable doubt that the man was guilty, under the law and the evidence, would you return
25 a verdict of guilty which would be followed by the infliction of the death penalty?

A. I do not think I could, sir. That is what I was trying to impress before, but the court brought it up in a different shape.

Q. Then I understand you are opposed to capital punishment?

A. Yes, sir.

Q. And that opposition would prevent your returning a verdict of guilty in a case?

A. Yes, sir.

The COURT. Notwithstanding the law and the evidence might prove the case beyond a reasonable doubt?

A. I believe it would.

The COURT. That would disqualify you.

Mr. CLAYTON (of counsel for defendant). The jury has already been selected and I would like to ask him a few questions further.

The COURT. He was not necessarily accepted.

Mr. CLAYTON (of counsel for defendant). I would like to ask him a few questions further.

The COURT. None of them are absolutely accepted until the panel is finally passed upon.

Mr CLAYTON (of counsel for defendant). We are not taking exceptions to that. I am simply asking for the privilege of asking the gentleman a few more questions.

The COURT. Of course; you have that right.

Mr. CLAYTON (of counsel for defendant). I understand you to say awhile ago that if you were selected as a juror and the oath administered to you, that you would return a verdict in accordance with the law and the evidence, if that oath rested upon your conscience—that if the testimony was sufficient to satisfy your mind beyond a reasonable doubt
26 of his guilt, that acting under the pressure of that oath you would do so? Now, what do you say, would you or would you not?

A. I do not believe that there is any testimony that would be sufficient for me to say that I would be willing to break a man's neck.

The COURT. That settles it.

Mr. CLAYTON (of counsel for defendant). Notwithstanding you should be convinced of his guilt?

A. Yes, sir.

Q. And notwithstanding the fact that your oath would require you to determine such a verdict, you would not do it?

A. No, sir; I would not agree to kill a man; if I could put him in the penitentiary I would do that.

The COURT. That is all; you may stand aside.

Mr. CLAYTON (of counsel for defendant). Inasmuch as the juror had been passed we regard it as a selection, and object to Mr. Hamlin being discharged from the jury at this time.

The COURT. I want the record to show that the jury is not passed until the jury is made up. Let it go down in the record that the court being informed by the district attorney that additional information had come to his mind as to the qualifications of Mr. Hamlin as a citizen to make a juror that the court permitted further interrogatories to be put to the juror, and that this was done before the panel of twelve was made up.

Mr. CLAYTON (of counsel for defendant). And then that the court announced the juror disqualified, with our objection.

The COURT. Certainly; I think most any court would, upon the answer given by the gentleman.

Mr. CLAYTON (of counsel for defendant). We are not excepting to the answer, but to you honor's declaring him disqualified at this time.

27 Whereupon the court overruled the objections of the defendant and declared the juror disqualified, to which action of the court in overruling the objections of the defendant and declaring the said juror disqualified the defendant at the time excepted.

Whereupon another member of the panel was called into the box, sworn to answer questions touching his qualifications as a juror in this case and found to be qualified. And the district attorney announced that the jurors were good for the Government, and the last three gentlemen of the panel called into the box were presented to the defendant for his peremptory challenges, and were accepted by him, and the jury was then sworn to try the case.

And the United States, to maintain the issues on its part, introduced and examined the following-named witnesses: Henry C. Dickey, Arthur Dodge, John T. Padget, Mary Padget, Emmet Miller, Julius Orlick, John Kelley, Oscar Johnson, who testified as follows:

2 HENRY C. DICKEY, having been duly sworn upon behalf of the Government, and examined by Hon. Jas. F. Read, the district attorney, *and* testified as follows, to wit:

Question. What is your name?

Answer. Henry C. Dickey.

Q. Where do you live?

A. St. Louis.

Q. Did you know Floyd Wilson during his lifetime?

A. Yes, sir.

Q. Do you know Henry Starr?

A. I know him when I see him; yes, sir.

Q. Did you ever hold any official position under the marshal of this court?

A. Yes, sir.

Q. What was that?

A. Deputy U. S. marshal.

Q. You were deputy U. S. marshal under whom?

A. Under Col. Yoes.

Q. Were you regularly commissioned?

A. Yes, sir.

Q. Sworn in as such?

A. Yes, sir.

Q. As such officer, did you at any time have a warrant for the apprehension of Henry Starr?

A. Yes, sir; Henry Starr and others.

Q. I will get you to examine this and say whether or not it is the warrant which you had [handing witness a paper]?

A. Yes, sir; that is the warrant.

The COURT. Have you got his commission as deputy marshal?

The WITNESS. I have it [producing a paper from his pocket]?

The COURT. What is the date of that commission?

29 A. August, I think, of last year.

The COURT. Sworn in the same day?

A. Yes, sir.

The DISTRICT ATTORNEY. I desire to introduce this in evidence.

The COURT. (To counsel for defendant.) Do you admit this seal of the clerk on it, and the signature?

The DISTRICT ATTORNEY. It is by I. M. Dodge, deputy clerk.

Mr. CLAYTON (of counsel for defendant). Yes, sir; I suppose the record will show the oath of office.

The COURT. The seal is admitted.

The DISTRICT ATTORNEY (to witness). You say you did take the oath of office?

A. Yes, sir.

The DISTRICT ATTORNEY. I will now read the warrant referred to by the witness, it being as follows——

Mr. CLAYTON (of counsel for defendant). That warrant is without seal.

The COURT. It does not require any seal from the commissioner.

The WITNESS. Mr. Wheeler, the commissioner, gave it to me.

The DISTRICT ATTORNEY. The warrant reads as follows:

"United States of America, western district of Arkansas.

"The President of the United States to the marshal of the western district of Arkansas, greeting:

"Whereas, complaint on oath hath been made before me, charging that Edward Newcomb, Jesse Jackson, Henry Starr, and Ben Benjamin, did, on or about the 17th day of August, A. D. 1892, in the Indian country, western district of Arkansas, commit larceny, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

30 "Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Newcomb, Jackson, Starr, and Benjamin, and bring their bodies forthwith before me, Stephen Wheeler, commissioner appointed by the United States district court for said district, whenever they may be found, that they may be then and there dealt with according to law for said offense.

"Given under my hand and seal this 18th day of November, 1892, in the 117th year of our Independence.

Signed,

"STEPHEN WHEELER,

"*Commissioner U. S. Court, Western District of Arkansas.*"

The following endorsements are on the back thereof:

"United States versus Edward Newcomb et al. Capias issued November 18, 1892. Returnable forthwith."

31 Mr. CRAVENS (of counsel for defendant). We want to note our objection to this warrant for the lack of its having any seal to it.

The COURT. You hold that a seal is necessary from the commissioner?

Mr. CRAVENS (of counsel for the defendant). The commissioner has a seal and we think it is proper for him to use it.

The COURT. Is there any law requiring a seal to such a paper to give it authenticity?

Mr. CRAVENS (of counsel for defendant). I think there is.

The COURT. I would like to have my attention called to it. The commissioner is not required to have any seal as far as I know.

32 Mr. CRAVENS (of counsel for defendant). We want to make our objection and save our exception if the court overrules it.

The COURT. You say the law is that way; in justice to the court you ought to present it.

Mr. CRAVENS (of counsel for defendant). If the court will give me time I will hunt it up.

The COURT. You had not better make your objection until you get your law. I do not want the objection to go down that there is a law and put the court in the position of deciding on it without having its attention called to it; it looks like laying a trap for the court.

Mr. CRAVENS (of counsel for defendant). There is no trap in this. My impression is—I am not clear about it myself—but I think there is such a provision, and I want the defendant to have the benefit of the doubt.

The COURT. There is no benefit to it if it is not the law. You cannot give the defendant the benefit of a doubt that does not exist. I want the law before passing upon your objection. You have had ample time to prepare your case, and you ought to be armed and equipped with the law to sustain your objections.

Mr. CRAVENS (of counsel for defendant). We did not anticipate that the writ would be presented without the seal. We know our case, but do not know theirs.

The COURT. If you want to urge this objection I want to know
33 the law you refer to. If you hav'n't got any law, say so. The court decides that the paper is competent, unless you deny the signature. What do you say as to the signature?

Mr. CRAVENS (of counsel for defendant). We do not deny that.

The COURT. Mr. Stenographer, let the record show that the signature to this paper is admitted by counsel for the defendant to be the signature of Stephen Wheeler.

The COURT (to counsel for defendant.) Do you admit his office—that he is United States commissioner for the western district of Arkansas?

Mr. CRAVENS (of counsel for defendant). We do not deny he is a U. S. commissioner, but we simply make this point: In speaking as such commissioner he must speak with his seal. I am frank enough to state to the court that I am not entirely satisfied about our position myself, but I am under the impression that we are sustained by the law.

The COURT. Mr. Stenographer, let the record show that it is admitted by the counsel for the defendant that Stephen Wheeler was a United States commissioner for the western district of Arkansas at the time of the issuance of this writ, and is now such commissioner, and the signature to this writ is his signature, but that defendant denies the authenticity of the writ because the commissioner's seal is not on it.

Mr. CRAVENS (of counsel for defendant). Yes, sir; that is the point we make on it, and it being admitted by the court we save an exception to its admission.

The DISTRICT ATTORNEY. I desire to offer to counsel for
34 defendant for their inspection the oath of office of Mr. Dickey.

(Counsel for defense examine oath of office.)

Mr. CLAYTON (of counsel for defendant). We have no objection to that.

The DISTRICT ATTORNEY. The oath of office reads as follows:

"Oath of office.

"I, Henry C. Dickey, do solemnly swear that I will faithfully execute all lawful precepts directed to the marshal of the United States for the western district of Arkansas, under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of deputy marshal of the western district of Arkansas during my continuance in office, and take only my lawful fees; so help me God.

"HENRY C. DICKEY. [s. s.]

"Sworn and subscribed to before me this 3rd day of August, 1892.

"I. C. PARKER,
"*U. S. Dist. Judge.*"

The DISTRICT ATTORNEY. I also offer his commission.

Mr. CLAYTON (of counsel for defendant). That may be considered in without reading it.

The DISTRICT ATTORNEY. Very well; it is considered in.

The commission introduced by the district attorney is as follows, to wit:

"Know all men by these presents:

"That I, Jacob Yoes, marshal of the United States for the western district of Arkansas, reposing special trust and confidence in Henry
35 C. Dickey, of Vinita, I. T., in the said district, have constituted and appointed, and by these presents do constitute and appoint

him, the said Henry C. Dickey, full power and authority as my deputy marshal throughout the said district, to use and exercise the same office of deputy marshal according to the laws and custom of the United States relative to and regulating the office of deputy marshal during my term of office, unless he shall sooner be legally discharged therefrom.

"And I do fully authorize and empower him, my said deputy marshal, to execute any and all legal precepts and duties that might of right be required of me as marshal as aforesaid. And I do further declare all his official acts valid as if done by myself.

"In testimony whereof I have hereunto set my hand and seal this 3rd day of August, A. D. 1892, at Fort Smith, in the western district of Arkansas.

"(Signed)

"JACOB YOES, [SEAL.]

"*Marshal of the United States for the Western District of Arkansas.*

"Attest:

"STEPHEN WHEELER,

"*Clerk U. S. Court, Western District of Arkansas.*

By "I. M. DODGE,

"*Deputy Clerk.*"

Mr. CLAYTON (of counsel for defendant). What is the date of that writ?

The DISTRICT ATTORNEY. 18th of November, 1892. [To the witness.] What did you do upon getting this writ; what steps did you take towards the execution of it?

A. I made two different attempts to find Starr and the others named in that writ—Starr, Jackson, and Newcomb.

36 Q. Where did you go for that purpose?

A. To Nowata, and in the neighborhood, and Lenapa.

Q. Did you know where Starr lived?

A. Yes, sir; I was at his mother's once.

Q. You say you made two trips?

A. Yes, sir.

Q. Did you have Wilson with you on either of these trips?

A. Yes, sir; the last trip; the first trip I went with Heck Bruner and his posse.

Q. The first trip?

A. Yes, sir.

Q. Where did you meet Wilson before starting out on that trip with him?

A. I found Wilson on the Valley Train.

Q. On the Arkansas Valley route?

A. Yes, sir; I met him at Wagoner on the train.

Q. What did you do? Did you summons him as your posse?

A. I called him and told him where I was going. It was some three or four days before the killing. We went down there and back and forward on the road. Saturday night I went *ot* Nowata and staid all night there and made arrangements to get horses.

Q. For what purpose?

A. To go after Starr, to go out in the neighborhood; I learned that he was at his brother-in-law's, Bill Lipsy's, in the neighborhood. I made arrangements for the horses on Saturday night, and Sunday night we got off there, I think the train was due there about 11 o'clock, or half past, and we got off the train, and our horses were there, and the guide, and were out in the stockyards. I told them to take them over in the stock-
37 yards, and not let anyl ody know we were coming at all. We found the horses, and we had a fellow named Jim Gabriel there as a guide for us.

The DISTRICT ATTORNEY. I desire to introduce at this point in evidence the information upon which the writ was issued.

Mr. CLAYTON (of counsel for defendant). You may consider that in without reading it.

The DISTRICT ATTORNEY. I will just read that. It is dated September 13th, 1892, and reads as follows:

"United States of America, western district of Arkansas.

"I do solemnly swear and believe from reliable information in my possession that Edward Newcomb, Jesse Jackson, Henry Starr, and Ben. Benjamin did, in the Indian country, within the Cherokee Nation, western district of Arkansas, on or about the 17th day of August, 1892, feloniously steal, take, and carry away from the lawful possession of George Hood and James Axley, white men, eight head of horses of the value of $300.00, against the peace and dignity of the United States, and I pray a writ.

"(Signed:)

"W. R. COWDON.

"Subscribed and sworn to before me this 13th day of September, 1892.

"(Signed:)

"STEPHEN WHEELER,
"*U. S. Commissioner.*"

The following endorsements appearing on the back thereof:

"United States versus Edward Newcomb, Ben Benjamin, et al. Larceny. Information filed and capias and subpoena issued Sept. 13, 1892. Signed, Stephen Wheeler, U. S. Commissioner. Alias writ. November 10, 1892. Approved September 13, 1892. E. J. Fannin, assistant district U. S. attorney."

38 The DISTRICT ATTORNEY (to witness). Very well, now go ahead with your statement.

A. I found the horses there and Gabriel, and we got on them, and went on.

The COURT. I did not understand what the witness stated about his engaging Wilson as a posse?

The WITNESS. I met him, judge, on the train at Wagner, and called on him to go with me.

The COURT. As a posse?

The WITNESS. Yes, sir; we talked the matter over.

The COURT. To assist you in making the arrest.

The WITNESS. Yes, sir.

The DISTRICT ATTORNEY (to witness). Go on now where you left off. Did you engage him as a posse generally, or especially with reference to this case?

A. This case, strictly.

Q. You engaged horses at Nowata?

A. Yes, sir.

Q. For yourself, Wilson, and the guide?

A. Yes, sir; not for the guide; he had his own horse.

Q. Who was your guide?

A. Jim Gabriel.

Q. Where did you go from Nowata?

A. We started, and the first place we went from Nowata, I think, was old man Zane's house; I think he is a Delaware. We went to his house.

39 Q. Had you any information before you left as to where Starr would likely be?

A. Why, yes, sir; I had information that he would likely be there; it was Sunday night and I had been told that he was going to see old man Zane's daughter—Mary, I believe, is her name—and I expected to find him there, and if we did not find him there it was our intention to go on over to his brother-in-law's, Bill Lipsy's.

Q. How far did he live from Zane's?

A. I don't know; it seemed to me like it was a long distance. I guess it was 6 or 7 miles.

Q. What time was it when you got to Zane's?

A. I should think it was probably 1:00 o'clock in the morning.

Q. Did you remain there any length of time?

Mr. CLAYTON (of counsel for defendant). What morning was that?

The WITNESS. That would be Monday morning. (Answering the district attorney.) No, sir; we didn't remain there but a very few minutes, and then we came back towards Nowata and crossed that little creek there, I don't know the name of it, and we started from Zane's to go around this round-a-bout way; the guide didn't know the way to go nearer through, and we came around and went to Arthur Dodge's. He was in bed, and we got him up and got him to build a fire.

Q. What time in the night was that?

40 A. I think it was probably 2 o'clock or half past 2 in the morning when we got to his house; it may have been as late as 3:00; I don't remember the exact time.

Q. Did you get any information there as to where Starr was likely to be?

A. Yes, sir.

Q. Where was that?

A. Dodge told me——

Q. Not as to what he told you?

A. I got information that he was seen in the neighborhood that day, and that night about 8:00 o'clock he had gone to his brother-in-law's, Bill Lipsy's.

Q. That was the information you received?

A. Yes, sir.

Q. What did you do then?

A. We warmed there a while and rested; it was a very cold and disagreeable night, snowing or raining, and we went from there to Lipsy's house, and we got lost in the meantime and came back to Kenney's, and he directed us the way to Lipsy's, and we went direct from there over to Lipsy's house, and we didn't find Starr there.

Q. Where did you go from Lipsy's?

A. To a fellow's named Beach that lives down on the creek. He directed us the second time the way to Lipsy's house, and we went over there direct to Lipsy's.

Q. After leaving Lipsy's you say you went down to a man's named Beache's house?

A. Yes, sir.

Q. Wilson was with you going all this round, was he?

A. Yes, sir; Wilson and this man Gabriel.

Q. Proceed now.

41 A. Well, we did not find him at Beach's and could not learn anything about him, only that he had been there and left there about 7 or 8:00 o'clock the night before. He did'nt know where he had gone to, but thought he had gone to his brother-in-law's; we went from there and stopped again at Kinney's or stopped there in going by, and we went from Kinney's to Padget's, which is about a quarter or a half a mile from Dodge's house, and we got there, I think, about 6:00 o'clock in the morning.

Q. What direction is that from Dodge's house?

A. I think it is west.

Q. You got to Padget's about 6?

A. Yes, sir; about 6 o'clock in the morning; somewhere along about that time.

Q. Did you get any information as to Starr there?

A. Yes, sir; they told me he had been around there the evening before, but they didn't know where he was. It is my recollection now they said they had not seen him.

Q. Where did you go from there?

A. We went to Dodge's house from there.

Q. What time was it when you got to Dodge's house?

A. I think, sir, it was probably a little after 7 o'clock, or about 7. We staid at Padgett's quite a little bit.

Q. In the morning?

A. Yes, sir; Monday morning.

Q. How long did you remain at Dodge's then?

A. We were there all day.

Q. All day Monday?

A. And all Monday night.

42 Q. Who was at Dodge's house while you were there? Who were the inmates of the house?

A. There was no one there except Dodge and Mrs. Mary Walker, Mr. Dodge's housekeeper, and the children.

Q. Mrs. Walker is now Mrs. Padgett?

A. Yes, sir.

Q. There were only two grown persons there besides yourselves?

A. Yes, sir; that was all; Arthur Dodge and Mrs. Walker.

Q. Yourselves and the members of the family?

A. Yes, sir.

Q. Where did you remain during the time you were at Dodge's place?

A. Well, Monday we were around—we were as wet as could be, drowned in fact, and we staid there by the stove and dried, and along during the morning, I think, we laid down; I think probably right directly after dinner; laid down and slept three or four hours. We were not anywhere at all during the day. We staid right in the house or down about the barn looking after the stock.

Q. While you were that day did you hear of Starr being in the neighborhood?

A. Yes, sir.

Q. What time *aws* it you heard that?

A. It was along about 5:00 o'*8*clock in the evening. Starr came riding by the house.

Q. You did not see him yourself, did you?

A. No, sir.

Q. Don't state that then. Did you receive any information?

A. Yes, sir; Dodge came up and opened the door, and says to me——

Mr. CRAVENS (of counsel for defendant). Never mind what he said.

The WITNESS. I am telling about this information.

43 The COURT. You can just state you got the information as a fact without stating the details of the conversation.

The DISTRICT ATTORNEY. You got the information that Starr had just passed there, I understand?

A. Yes, sir; I got up and looked out, and I could see him going myself.

Q. In what direction was he traveling along then?

A. He went south and turned east. He was going east at that time.

Q. Went southeast from Dodge's house.

A. Yes, sir.

Q. Was he crossing prairie or woodland?

A. Prairie.

Q. What did you and Wilson do?

A. We went too the barn and got our horses—went around through the back part of Dodge's place.

Q. What was your object in doing that?

A. We thought he was going to Beach's to stay all night.

Q. Did you see him any more?

A. No, sir; I didn't.

44 Q. You missed him?

A. Yes, sir.

Q. Where did you go then?

A. We were out on the prairie for quite a while when we rode back to the house and put our horses up.

Q. Where did you remain then that night?

A. We stopped that night at Arthur Dodge's house.

Q. Did you leave the next morning?

A. No, sir, we didn't; we were about to leave, but we got information that Starr would be there during the day, and we concluded to remain there, and we staid there.

How long did you remain before you got information he was coming?

A. We went down in the morning and got our horses out, and was going away, and I got information that he would be by there by one o'clock anyway.

Q. You remained there, then?

A. Yes, sir.

Q. Did he come at that time?

A. He came along between 12 and 1; I don't know the exact time.

Q. What direction was he coming from?

A. He was coming west.

Q. Did you discover him first or did some one tell you he was coming?

A. No, sir; I was told he was coming. I was up in the barn loft. There was a gentleman came to the barn lofe. Dodge and myself and Wilson were there, we were helping him shell some corn, and he didn't come, and we didn't want anybody to see us at all, and we went up in the loft; we didn't know who the man was at all, and we were up in the loft during the time that this fellow was there. He left, and hadn't gone 50 feet from the barn hardly until I was told that Starr was coming.

Q. Did you see him then?

A. I didn't see him until I got out of the loft. When I got out
45 of the loft I saw him coming quite a little distance, coming west—quite a little distance, a mile about, away.

Mr. CRAVENS (of counsel for defense). How far away?

A. I should judge it was a mile and a half, or a mile; something like that; quite a little distance at any rate.

The DISTRICT ATTORNEY. What did you and Wilson do then?

A. We went in the house—went in the smokehouse started to the house, and we were asked by Dodge not to go in the house, to go in the smokehouse. He had a lot of small children around there, and he was afraid there might be shooting or something, and the children might get hurt, and he asked us to go in the smokehouse, and we did so. Starr came to the corner of the fence where he would turn north to go to the house, and in place of doing so he rode on sort of southwest. He didn't come to the house at all.

Q. Did Starr come to the house?

A. No, sir; he did not.

Q. Which direction did he go?

A. He went west—almost west, I should think.

Q. Could you see him from the house from where you were?

A. Yes, sir.

Q. What did you and Wilson do then? Just proceed now.

A. Wilson went down to get our horses, and I staid at the place to watch to see whether he turned down in the wooded lane, or went north to his brother-in-law's, and I lost sight of him, and Wilson had not been gone but a very short time until he come back riding a horse.

Q. Was it his horse?

A. No, sir; I didn't know at the time whether it was his horse
46 or not, but it wasn't; it was Arthur Dodge's horse.

Q. What did you do?

A. I hollered at him to wait, and he paid no attention, and I hollered at him again, and then this Mrs. Walker hollered at him to wait

for me, and then he turned around in his saddle, and he said, "Your horse will be here in a minute; hurry on." I stood there a second or two, run in the house and got my overcoat, and Dodge wasn't there yet, and I hollered at him and asked him why in the hell he didn't bring that horse on, and he replied the horse would not lead. Then I run on down towards the barn, and he just advanced with the horse, and I got on him there, and the horse would neither lead or go.

Q. Where did you go when you left the smoke house; to the house?

A. Yes, sir; I went to the house and got my overcoat.

Mr. CLAYTON (of counsel for defendant). You say you hollered to Dodge "Why in the hell do you not bring that horse out," and he told you he would not lead, and you went down there to where he was?

A. Yes, sir.

The DISTRICT ATTORNEY. Go ahead now.

A. I got on my horse, and the horse pitched and bucked and finally threw himself, tripped and fell, and rolled over on me. I got him off and got up, and got on him again, and backed up into the wire fence, and was about to fall and I got off of him again.

Q. Go on.

A. Do you want the whole conversation there and everything?

Q. No. You finally got your horse off, did you?

A. Yes, sir; after so long a time, and I thought I could run and beat the horse and started off a step or two, and I jerked the bridle rein over the horse's head, and we led him out there and Dodge had a club,
47 and I got on the horse, and finally I got the horse going, and when I got started Starr and Wilson looked to me like they were not over 60 or 80 feet apart; I should judge, about 80 feet apart or 60, somewhere along there; a very short distance.

Q. Were they on horseback or on the ground?

A. They were on foot. Each one appeared to be holding his bridle rein over his arm.

Q. Were they standing still or moving?

A. No, sir; they were standing still.

Q. What occurred then; what length of time did they remain in that position?

A. But a very short time, a second or two, or a minute. They appeared to be talking, and Wilson finally threw his gun to his shoulder and fired.

Q. What position did Starr have his gun in?

A. He had his gun rather down in that position (indicating).

Q. Holding it down?

A. Yes, sir.

Q. Both hands?

A. Yes, sir; and Wilson fired the first shot.

Q. Did you see what direction he fired?

A. Well, no; I could not tell. I expected—well, I could not tell anything about whether he was shooting to get the man's horse or not.

Q. You could not tell anything about that?

A. No, sir.

Q. Well, what occurred then?

A. After Wilson fired it was not a second until the other man fired. Wilson threw his gun—as he fired he threw the lever, and I could see

where I was that the gun was hung, it never came back at all. He got two shots; the first one struck him in here (indicating).

Q. Starr fired at him again?

48 A. Yes, sir. From the time he seemed to be firing rapidly—from the time he fired the first shot he kept firing rapidly.

Q. What became of Wilson?

A. Wilson, after that second shot, fell.

Q. How did he fall?

A. He fell right down; he didn't fall straight out, but just sank down; as he raised up he picked his feet up like and raised up in a sitting position, and jerked his six-shooter out.

Q. What was Starr doing at that time?

A. After Starr fell and jerked his six shooter Wilson fired four times very quick, and Starr was firing in the meantime, and then he commenced to run up on Wilson; he didn't fire; I don't think he was shooting from the time that he moved out of his tracks until he got right over Wilson, and then he fired point blank into him.

Q. He started to run up on Wilson?

A. Yes, sir; he never started to run up on Wilson, according to my best recollection, until Wilson fell—was lying back with his arms spread out.

Q. Let me understand you; when Wilson fell after these first shots was it the second or what was it that caused him to fall?

A. The first shot that Starr fired struck him down here in the leg.

Q. What makes you think that?

A. I know he did, for I was watching him, and I heard the crack of the rifle, and I saw Wilson jump, and the next shot it knocked him down. He rose up then, and drew his six-shooter, as I told you.

Q. When he rose up there and drew his six shooter, what was Starr doing?

A. Standing still, in the same position.

Q. Firing?

A. Yes, sir; and after Wilson fell Starr ran on him.

49 Q. You saw Wilson fire four shots from his revolver?

A. Yes, sir; and one from his Winchester.

Q. You speak of his falling; you say he *sna*k to his knees?

A. Yes, sir; after he fired the four shots out of his revolver he fell right backward, spread out on his back; he was laying in that position.

Q. Then you say it was that Starr ran on up to him?

A. Yes, sir, and shot him.

Q. Could you see how close the muzzle of the gun was to Wilson when Starr fired that shot?

A. It was very close. I could not tell the exact distance; he was standing almost directly over him.

Q. What was done then?

A. After he fired, or about the time he fired this last shot, I think, he had gotten probably within 100 yards of him, and this horse *off* mine took another spree there, and, I think, Starr shot at me during the time. I just fell off the horse, and as I fell I squatted along on the ground, and I had one of these old time Winchester shotguns. I don't know whether you have ever saw one or not, the slide is on top, and when I attempted

to throw a load in it it would not work, and I got a load in finally, and by that time Starr turned around, and he picked up Wilson's gun in the meantime, and he turned around to go away; was turning around as I fired at him.

Q. Do you know whether Starr fired at you before he fired at Wilson the last time or afterwards?

A. No, sir; it was afterwards.

Q. After he fired at Wilson the last time, he turned and fired at you?

A. Yes, sir.

Q. And then you jumped off the horse?

50 A. Yes, sir; my horse had quit going; he would not go through fright or something, and I hadn't the sign of a spur, and neither did Wilson, and I had nothing to force the horse with at all.

Q. When you fired at Starr was he on the ground or on horseback?

A. On the ground.

Q. What was done then?

A. Starr run then and caught Wilson's horse; his horse and mine ran off pretty near the same direction; his went almost north though, and mine went a little northeast; run over to Dodge's house, and Starr's went pretty near due north; mine went rather northeast I think, and it run until it got to Dodge's house, and they caught it over there, and rode it back. I advanced on him, and he run and got on this horse and went from there. As he got on he beckoned to me and hollered at me, beckoned with his hand, and kept that up as long as he was in sight.

Q. Did he say anything when he jumped on his horse?

A. No, sir; only yelled. Just yelled and that was all. He didn't say anything that I could distinguish at all. After he got out of sight I could hear him holler.

Q. You say after he had shot Wilson the last time, and after he had shot at you, you saw him pick up Wilson's gun?

A. He picked up Wilson's gun, and held it at me in that position [indicating], and was working it just as Wilson had worked it, and the gun was stuck tight, and then he threw the gun down, and then is when he run after this horse. That is the time I fired the only shot that I fired, was right then.

Q. Did you try to reload your gun again?

A. Yes, sir; and it wouldn't reload; it was filled with mud, and the gun would not work.

51 Q. Was it a magazine gun?

A. Yes, sir.

Q. A shotgun, did you say?

A. Yes, sir.

Mr. CLAYTON (of counsel for defense). Your gun was a shotgun?

A. Yes, sir.

The DISTRICT ATTORNEY. What did you do then?

A. I run up to Wilson and spoke to him, put my hands under his head and raised him up, and he was gasping when I got there, dead in fact; he di'n't know me.

Q. You say that he was shot right through; was that last shot through the bowels?

A. It may have been; it was right along in there, just about over the cutton of his vest here. Right along on here some place.

Q. Did you change his position in any way?

A. No, sir; none whatever; I just raised his head up a little and laid him back. I picked up his gun and saw what was the matter with it. The shell had thrown out all right, but the loaded one had stuck; wouldn't get out. It was hung, it looked like to me, in the point of the barrel. It took me quite awhile to get the shell extracted.

Q. How many cartridges were there left in the gun?

A. Six left in the gun.

Mr. CRAVENS (of counsel for defense). That is in Wilson's gun you speak of?

A. Yes, sir.

The DISTRICT ATTORNEY. How many cartridges did it carry?

A. Seven is what I think it carried. He fired one shot there.

Q. Where was his pistol lying?

A. His pistol was lying about three or four feet from him to the left; his Winchester was just about the same, lying off three or four or five feet.

Q. How many shots had been fired out of that?

52 A. There was four fired out of the pistol. There was only five cartridges in it.

Q. Was there one cartridge left in it?

A. Yes, sir.

Q. What was it, a five or a six shooter?

A. Six shooter. Wilson never carried but five in it at no time.

Q. How do you know there was five cartridges in it?

A. I know from the fact that there was four of them shot out and one left.

Q. Do you know how he carried his pistol?

A. I know he carried it with no more than five in it. He always carried the hammer on the empty barrel or sylinder.

Q. Did you examine to see where he was shot?

A. I didn't. I never turned him over. I never examined the shots that were in front. I didn't examine him even after I took him away.

Q. How many wounds did you observe?

A. I saw three.

Q. Where were they?

A. He was shot in here (in the leg). I think in here, and once kind of in here, and this one in here, and the other shot I don't know anything about that, for I never examined.

Q. That would make four, would it not?

A. Yes, sir.

Q. Please locate them again.

A. The first shot struck him down in here (in the leg), and I think there was another one scraped along in here. I didn't see that.

Q. I just want those you saw.

A. I could see two shots or three along up and down in his leg, and this one here in the breast, and this one here [indicating].

Q. On the left leg you indicate?

A. Yes, sir.

Q. You didn't undress him or examine the wounds?

A. No, sir; I didn't.

53 Q. Where was he taken then?

A. I took him to Lonapa and from there to Coffeyville, and then brought him to Fort Smith.

Q. Who did you turn him over to at Coffeyville?

A. To the undertaker. I wired from Lonapa to the undertaker for him to meet us at Coffeyville, and they done so. Johnson came down there; the route agent, O. H. Johnson, was down there with me, and he examined him, and can tell you more about him than I can.

Q. He examined the body?

A. Yes, sir.

Q. I understand, then, at the time of this difficulty they were both on the ground when you saw them facing one another?

A. Yes, sir.

Q. From what direction were you coming?

A. They were standing facing each other, and Starr was looking east and Wilson west, and I was coming rather a southwest course; they were almost east and west.

Q. So, then, that neither one were between you and the other?

A. No, sir; I could see everything that was going on.

The COURT. I would like to get on the record that Starr was holding his gun.

The WITNESS. The gun is in the marshal's office.

The COURT. That is, Floyd Wilson's gun?

A. No, sir; Starr's gun. Starr went away and left his gun and everything he had.

Mr. CLAYTON. Where is your gun; is it here?

A. No, sir; it is not here. I can get one just like it.

Mr. CRAVENS. I believe you say you were going southwest?

A. Yes, sir; I think that is the course.

Q. Starr was facing east and Wilson west, and you were going southwest?

A. Yes, sir.

54 The DISTRICT ATTORNEY. That you say is the course as you remember it?

A. Yes, sir.

Q. You speak of Starr holding his gun with the muzzle down when you looked at them?

A. Yes, sir; that is when I first saw them at the time this shooting commenced.

Q. Where was his right hand; was that on the lock or about the guard or where?

A. He had his bridle rein over his left arm, and he was standing in that position with his gun in that position.

Q. You say "in that position," but the stenographer can not get that down. Describe where each one of his hands were.

A. I could not explain it by horizontally or vertically or anything of that kind. I can show you again how he was holding the gun, but that is the best I can do.

Q. Was either hand about the guard of the gun, or how?

A. It looked to me like I would hold a gun if I was ready to shoot.

Mr. CLAYTON (of counsel for defendant). Never mind how you would hold your gun; you didn't do much shooting. Just tell how he held his.

The COURT. I think the answer of the witness was competent. I think he has a right to say he was holding it as thought he was going to shoot.

Mr. CLAYTON (of counsel for defense). That is better.

The WITNESS. He was holding the gun this way (indicating with a gun), and I think the bridle rein was over his left arm, and he had the gun that way.

The DISTRICT ATTORNEY. Where would his right hand be?

A. It was there about the lever, the way I could see it. It wasn't right square on to it, but that was the position he had it about
55 in there (indicating).

Q. About where the trigger is?

A. Yes, sir; right about the trigger.

Q. And the left hand was——

A. Yes, sir; in here; about half way on the barrel.

Q. Standing in the position of a man about to shoot?

A. Yes, sir; they were standing facing each other.

The COURT. Is that Starr's gun you now have in your hands?

A. Yes, sir.

The DISTRICT ATTORNEY. How far were they apart when you first r*oad* up on them?

A. It looked to me like they were about 60 feet apart—somewhere about there.

Q. Or when you saw them?

A. I should judge they were 60 or 80 feet apart.

Q. You say they were were standing about 60 or 80 feet apart when you first saw them?

A. Yes, sir; I should judge so.

Q. How long did they remain there before anything occurred?

A. Well, it was probably a minute and a half or such a matter, or two minutes, from the time I saw them until the firing commenced.

Q. What were you doing during that minute and a half?

A. I was going towards them.

Q. How long did your horse continue towards them after that fir g began?

A. Well, I kept going right along until the horse got right close to them and quit. He appeared to take fright at something. It may have been that Starr had shot; I do not know.

Q. It may have been Starr shot where?

A. Had shot at me at the time, I could not force the horse;
56 he wouldn't do any good at all. I was aiming to go right in between them, is what I was trying to do. I went down over a little bit of gulley that runs there. I had slowed a little getting over that, and the horse came up out of the gulley, and I could not get him into any speed at all.

Q. You got up to what distance, do you think, of them?

A. In 100 yards, I should think; something like that.

The COURT. Where did this all occur?

A. That was about 7 or 8 miles from Nowata.

The COURT. What country is that in?

A. In the Cherokee country.

The DISTRICT ATTORNEY. What day was it?

A. The 13th of December last, on Tuesday.

Q. Was Wilson a white man or an Indian?

A. He was a white man.

Q. Do you know what nationality Starr is?

A. No, sir; I do not know, only what I have heard. I don't know anything of his nationality.

Cross-examination by Mr. W. W. H. CLAYTON:

Q. You saw Floyd Wilson, the deceased, I believe you say, on the train at Wagoner?

A. Yes, sir.

Q. Did you start from there to make that arrest?

A. No, sir.

Q. Where did you start from?

A. The first time I started to make that arrest I started—I had been down to Vinita and seen Heck Bruner and he told me——

Q. Never mind what he told you; I asked you where you started from?

A. From Wagoner.

57 Q. Where did you live at that time?

A. I lived, sir, in St. Louis, Missouri.

Q. When did you leave St. Louis?

A. I left St. Louis, sir, I think along the latter part of June or July, sometime, probably in July.

Q. What was your business at St. Louis?

A. I was special detective for the Pacific Express Co.

Q. A detective?

A. Yes, sir; you might call it that.

Q. For the Pacific Express Co.?

A. Yes, sir.

Q. How long had you been in the business of a detective?

A. Ten or twelve years, or something like that; possibly longer.

The DISTRICT ATTORNEY. I forgot one question. Did Floyd Wilson know you had the warrant?

A. Yes, sir; I showed him the warrant.

Mr. CLAYTON (of counsel for defendant). You first started to arrest Mr. Starr, the defendant, sometime in June, and what is the date of that writ?

The DISTRICT ATTORNEY. It is November 18th.

Mr. CLAYTON (of counsel for defense). This writ is dated November 18th.

The ASSISTANT DISTRICT ATTORNEY. The alias writ dated November 18th.

Mr. CLAYTON (of counsel for defendant). Did you have a writ the first time you were after him?

A. Yes, sir; I had a writ the first time I was after him.

Q. You were working for the reward, were you not?

A. No, sir.

Q. You say that you met Floyd Wilson on the train?

A. I can tell you the salary I was drawing if you would like to know.

Q. I am not particular about that. I have not asked you for
58 it. I have not asked you about the salary, Mr. Dickey.

A. No, sir; you asked me if I was working for the reward.

Q. No, I didn't; I asked you if you arrested him you expected to get get a reward for Henry Starr.

A. I had no thought about the reward; in fact, I didn't know there was any, either.

Q. You say you went there in June?

A. No; I think it was in July, now; I went up there about that somewhere; I could not tell without looking it up; the records will tell. I will tell you how I can get at it; if you remember the time of the Adair robbery; I went there shortly after that.

Q. I would like for you to fix that as near as you can?

A. I could not fix it exactly; it was immediately after that Adair robbery that I went down there.

Q. Had you seen Floyd Wilson before you met him on the train? Had you ever seen him before?

A. Yes, sir; frequently; a great many times.

Q. Had you ever been a deputy marshal prior to that time?

A. Well, a long time ago, sir; a long time ago.

Q. How long ago?

A. Well, I was deputy marshal and done some service under C. C. Allen at the time he was marshal for western district of Missouri.

Q. Nobody knows when that was but you?

A. Probably in 1880 or 1884.

Q. Had you ever acted or ridden as a marshal in the Indian country?

A. In the regular service, no, sir.

Q. Your services as a detective was a secret service, was it not?

A. No, sir; everybody knows me, nearly.

Q. You think that everybody knows you.

59 A. Everybody where I work know me.

Q. You think that everybody in the Indian country knows you?

A. Yes, sir; they did at that time; pretty near everybody knew me.

Q. Were you an officer?

A. I was an officer from the time I came to the country; I think my commission there is Augist third.

Q. You were not an officer except the time you were a deputy marshal?

A. No, sir; not an officer of this court.

Q. Where did you go when you went there in June or July?

A. I went to Muskogee and Vinita, and I was up and down the M., K. & T.

The DISTRICT ATTORNEY. Down here to Fort Smith?

A. Yes, sir; I was down here.

Mr. CLAYTON (of counsel for defense). I am speaking about the time you went to arrest Henry Starr in June or July.

A. I never told you anything of starting to arrest him in June or July.

Q. I understood you to say it?

A. I never said it.

Q. What did you say you did in June or July?

A. I came down to this Indian country, is the question you asked me, when I came here, and I said in June or July.

Q. I asked you when you started out to arrest Henry Starr. When did you first start out to make his arrest? That is the question I asked you.

A. I don't know. The first time I went to start was about 10 days before this killing, along in December.

Q. When you went for him first?

A. Yes, sir.

Q. Up to that time you had not been in the Indian country as an officer?

A. Yes, sir; I had been there from the third of August.

Q. That is the date you received your commission?

A. Yes, sir.

Q. But you had not been in Starr's neighborhood prior to that
60 time.

A. I had been up there a great many times.

Q. Where?

A. I had been all over the country.

Q. Where? In Starr's neighborhood?

A. Yes, sir.

Q. What is the nearest point?

A. I had been to Nowata.

Q. How far is that from where he lives?

A. His mother lives there.

Q. What was your business there?

A. I just went up there to see Mrs. Walker, shortly after Henry started, got out and jumped his bond.

Q. Then, until you went to arrest Starr you had not been there prior to that time until you went up there to locate him at Mrs. Walker's, to see her about it?

A. No, sir; I don't believe I had.

Q. Now, when was that?

A. I could not tell you the date of that at all.

Q. Did you know Henry Starr?

A. I had seen him once when he was under arrest.

Q. You and he were strangers?

A. Yes, sir.

Q. You had never seen him but once, and that time he was under arrest?

A. Yes, sir.

Q. Do you know whether Floyd Wilson knew him?

A. No, sir; I don't know whether he knew him at all or not.

Q. You never learned from Wilson that he was acquainted with him, did you?

A. Well, now, I don't know; I wouldn't say whether Floyd was acquainted with him or not.

Q. At any rate he gave you no information of the fact that he was acquainted with him. Now, Mr. Dickey, going back to the time you employed Wilson, that was done in the Indian country, on the
61 cars at Wagoner, was it not?

A. Yes, sir.

Q. You did not carry him from any of the States into the Indian country as a posse, did you?

A. No, sir.

Q. Either from Missouri, Arkansas, Kansas, or Texas?

A. No, sir; I never saw Floyd Wilson outside of Arkansas or in the Indian Territory in my life—outside of that.

Q. I don't care when you saw him. The fact is you employed him in the Indian Territory at Wagoner.

A. I called on him at Wagoner.

Q. Did you employ him to go with you?

A. No, sir; I did not employ him.

Q. What compensation was he to have for his services?

A. I was not to give him anything at all. I was to pay his expenses.

Q. Was that all?

A. That was all, sir.

Q. How was he to be paid?

A. Well, I was told by Heck Bruner——

Q. Never mind what you were told by Heck Bruner.

A. I informed——

Q. Never mind what you were informed by Heck Bruner. Tell me from what fund he was to be paid.

A. He was not to be paid anyway at all that I know of. I never agreed to pay him anything.

Q. You never agreed to pay him anything?

A. I told him all the fees that was in the case he could have; I told him if there was any rewards in the case he could have them.

Q. Were there any rewards?

A. Nobody ever told me there was any. No one that ever wanted him had offered any. Our company had offered $50.00.

Q. You didn't employ him; didn't offer him anything at all?

62 A. No, sir; I did not.

Q. Was he registered; did you register him as a posse?

A. No, sir; I did not.

Q. Now, Mr. Dickey, when you started from Wagoner you went to Nowata first, I believe you stated?

A. No, sir; we didn't do anything of the sort.

Q. You might go on and tell me what you did do?

A. Do you want to know?

Q. I will ask you if you did not?

A. We went to Coffeyville; we rode over that three or four times.

Q. What was that for?

A. Waiting for Paden Tolbert to come in here to go with us to make this arrest.

Q. You wanted Tolbert to go with you?

A. Yes, sir; there was an arrangement between Tolbert to that effect.

Q. Had you prior to that time been over to Nowata?

A. I went over there on Saturday night and made arrangements for this stock and a guide, for horses to ride and a guide to go with us.

Q. Were you riding up and down the road a number of time—I believe you stated you went to Nowata after you road up and down that road; is that right?

A. Yes, sir; that is right.
Q. To whose house did you first go?
A. I went to McCarty's house, the liveryman.
Q. That is where you got your horses?
A. No, sir; I got them from a man named Bill Smith.
Q. You got them there?
A. No, sir.
Q. Where did you get them?
A. I presume I got them from McCarty.
Q. Go on now and state where you went to from there.
63 A. We went from there as I stated a while ago, we went from there to Zane's, was the first place we went.
Q. From Zane's where?
A. From Zane's we went to Dodge's.
Q. From Dodge's where?
A. To Lipsey's.
Q. You went to Lipsey's?
A. Yes, sir.
Q. Did you have your writ with you?
A. Yes, sir.
Q. You had the writ yourself?
A. Yes, sir.
Q. Did you find the people up at Lipsey's out of bed?
A. No, sir; they were in bed.
Q. Did you get them up?
A. Yes, sir.
Q. Did they open the door for you?
A. No, sir.
Q. Did you get in?
A. Yes, sir.
Q. How did you get the door open?
A. Kicked the door in.
Q. Did you find the prisoner there?
A. No, sir; he was not there.
Q. You bursted the door in at the house where you did not find the prisoner?
A. We bursted the door in.
Q. And didn't find the prisoner?
A. No, sir.
Q. Was that the prisoner's house?
A. No, sir; but we were informed that he was there.
Q. You went to a house where the prisoner did not live and bursted the door in? Who bursted the door in?
A. Wilson kicked the door in.
Q. You didn't?
A. I did not.
Q. Did you inform them there as to whether you had a writ or not for Henry Starr?
A. No, sir; I didn't. I told them we were officers and were after Henry Starr and to open the door.

Q. You didn't inform them you had a writ before you bursted the door open?

A. Lipsey said, "Don't be in such a hurry——"

64 Q. I am not asking you what Lipsey said.

The DISTRICT ATTORNEY. I believe if the gentleman goes into what occurred there the witness may tell the whole of it.

Mr. CLAYTON (of counsel for defense). He must answer my question first, and then if he wants to state anything else I am perfectly willing for him to do it. [To witness.] You didn't inform him you had a writ for Henry?

A. We told him wee were officers and they refused to open the door.

Q. Lipsey told you not to be in such a hurry?

A. Yes, sir; something of the kind.

Q. You have stated you did not tell them you had a writ or what you wanted, but you were simply officers and to open the door; that is your statement?

A. I told them we were after Henry Starr.

The COURT. What was your statement in that respect?

The WITNESS. Wilson called, I think, to open the door, and inside he asked who was there, and he said, "Officers," and said what we were there and he said, "Don't be in a damned hurry," or some language of that sort, and Wilson stepped back and kicked open the door and we went in there.

Q. How did he go in?

A. From the door.

Q. Did he have his gun with him?

A. Yes, sir.

Q. What gun did he have?

A. He had his Winchester rifle.

Q. Did he have any other weapon with him?

A. No, sir; he did not have any other weapon at all at that time.

Q. Where was his pistol?

A. Jim Gabriel had his pistol around back of the house.

Q. Where were you?

A. I went right in behind him; we almost went in at each other's side.

65 Q. Did you have a shotgun?

A. Yes, sir.

Q. Did you have it cocked?

A. Yes, sir.

Q. Did Wilson have his Winchester cocked?

A. I don't know; I could not answer for that.

Q. You went in the house and searched it, did you not?

A. Yes, sir.

Q. Who did you find there?

A. We didn't find anybody at all except Mr. Lipsey and his wife and children.

Q. Were there any children there?

A. There was a little girl, or child—I don't know how many there was—one, however.

Q. What time in the night was that?

A. That, I think, sir, must have been between 3 and 4 o'clock in the morning, possibly about 4 o'clock in the morning.

Q. Mrs. Lipsey was a sister of Henry Starr, was she not?

A. I was informed she was.

Q. That is what you understood?

A. Yes, sir.

Q. Who searched the house?

A. Wilson went upstairs and I staid down below.

Q. Why didn't you go upstairs?

A. Well, he got in and went up—that is, he picked the lamp up and ran right up.

Q. He made the search?

A. Yes, sir.

Q. Did he go anywhere else but upstairs?

A. There was no place else to go, except a little kitchen room and upstairs, is all the rooms there were.

Q. Did he go into the kitchen room?

A. He had to go there to go upstairs.

Q. Did he search there?

66 A. He didn't make any search; he could see at a glance what was there.

Q. Did he look under the beds?

A. I looked under the beds.

Q. That is about all the searching you did?

A. I looked under the beds.

Q. Did you find anything?

A. No, sir.

Q. After you made that search you went to Beeches's, did you?

A. Yes, sir.

Q. Did they let you in?

A. I went in without asking.

Q. Who went in first?

A. I did.

Q. You found the door open?

A. No, sir.

Q. How did you get in?

A. The latchstring was out, and I pulled the latchstring and went in.

Q. That is one place where the latchstring was on the outside?

A. Yes, sir; it was out.

Q. Did you find him there?

A. No, sir.

Q. Did you inform them there that you had a writ for Henry Starr?

A. Yes, sir; I told them myself we were looking for Henry Starr.

Q. You went to some other places that night before you went to Beeches, but I don't care for that. You got to Beeches, I believe you stated, about 6 or 7 o'clock the next morning?

A. No, sir; I didn't say that.

Q. I meant to say Dodge's. About 7 o'clock you got there?

A. Yes, sir.

Q. You were pretty wet and you dried your clothing, and you staid there and slept and set around there during that day?

A. Yes, sir.

Q. In the evening you heard that Henry Starr passed by?

Yes, sir.

67 The DISTRICT ATTORNEY. You were at Lipsey's on Monday morning, were you not?

A. Yes, sir; we started out on Sunday night, and by the time we got around there it was Monday morning—I should jusgd about 4 o'clock.

Mr. CLAYTON (of counsel for defense). You staid all day Monday at Lipsey's, I mean at Dodge's; is that right?

A. Yes, sir.

Q. It was Monday evening you learned that Dodge—you learned that evening that Henry Starr passed by there?

A. Yes, sir.

Q. You went out and saw him and followed him up?

A. Yes, sir.

Q. You went around the field and failed to overtake him?

A. Yes, sir.

Q. In what gait was he going when you saw him?

A. When I saw him he wasn't riding fast at all; he was in a lope.

Q. In a lope, or a mere dog trot?

A. It is my recollection he was in a short lope.

Q. Did he look back?

A. I don't remember that he did.

Q. He wasn't going as a man that was trying to escape from you then, just riding along the road?

A. My recollection is that he was riding along on a short lope; it was getting dark, and we could just barely distinguish the man. We could hardly see him. It got dark very quick then; it was after five o'clock, and it was a foggy night.

Q. You missed getting him, came back and staid the balance of the night; that would be Monday night, would it not?

A. Yes, sir.

Q. At Dodge's?

A. Yes, sir.

Mr. CRAVENS (counsel for defendant). When Starr was going off didn't you say that he first went east and then south?

A. No, sir; I said he went south and then east.

68 Q. Going over towards Beeches?

A. Yes, sir.

Mr. CLAYTON (of counsel for defense). That is what you thought?

A. Yes, sir.

Q. Did you go to Beeches's that evening?

A. No, sir.

Q. If you thought he was going there why not go over there?

A. We made up our minds that he didn't go there; that is the reason we went that way; we wanted to head him off, and we didn't get to. We went north a little *peice* across a branch running through Dodge's place, and then we turned east, direction that Starr was going when we last saw him, and then east ways, and then turned south.

Q. You sta'ed that you staid all night at Dodge's?

A. Yes, sir.

Q. You made no further effort to capture him that night?
A. No, sir.
Q. Mrs. Walker was staying at Dodge's?
A. Yes, sir.
Q She is now Mrs. Padget?
A. Yes, sir.
Q. Was her name Walker or Brown?
A. I was told her name was Walker.
Q. Anyhow, it is the same woman who is now Mrs. Padget?
A. Yes, sir.
Q. You remaineed all night Monday night at Dodge's, and then on Tuesday morning you spent all the forenoon at Dodge's?
A. Yes, sir.
Q. Where did you spend the day on Tuesday?
A. Tuesday forenoon we spent a good part of the time down there——
Q. In the hayloft were you not?

A. No, sir; we were not in the hayloft over three-quarters of
69 an hour or an hour; we were down shelling corn for Dodge.

Q. You were not going for the prisoner much, were you, but you were waiting for him to come to you?
A. That morning, yes, sir; we were waiting for him to come to us.
Q. What time did you get to the hayloft, you and Wilson?
A. I should judge it was between 11 and 12 o'clock we were up there, possibly a half or three-quarters of an hour.
Q. You went up there and took your guns with you?
A. Yes, sir.
Q. You were expecting him to come there; why didn't you have your horses saddled and bridled, and your spurs on, if you expected him to come there, so if it became necessary to make a chase you could do it?
A. I don't know, colonel; I have often thought about that myself since, but we expected him to come to the house; we never concluded to find him anywhere except right at the house. Our information had been to that effect.
Q. The fact is you had made no preparation of that kind at all?
A. We even had our saddles hidden there in the back part of the building, and our horses were out of the way so nobody could see them.
Q. A man came to Dodge's place on horseback that morning?
A. Yes, sir.
Q. Who was that?
A. I don't remember his name. By the way, he said that man stole a horse from him; I don't know his name. I heard his name, but I have forgotten it. He was some farmer down there.
Q. You thought that was Starr when he first made his appearance on the prairie?

A. No, sir; not a bit of it. Dodge told us who it was, and told
70 us we had better get up in the barn; that there was a man coming, and told us who he was. We didn't want anybody to see us at all. We didn't want the information to get to Starr that we were there.

Q. You didn't want Starr to know you were in the country?
A. No, sir; we didn't want him to know we were at Dodge's place.

Q. You didn't want him to know even that you were anywhere about, did you?

A. I don't know; I presume that he knew we were in the country somewhere.

Q. You never told him you were there?

A. No, sir.

Q. Did you see the man who came there—this stranger?

A. I never saw him until he got there; he was right down in under us talking to Dodge; talked there quite a long time.

Q. He left there without knowing you were there?

A. Yes, sir; I presume he didn't know we were there at all.

Q. You remained up in the hayloft?

A. Yes, sir.

Q. How long after he left did you remain in the hayloft?

A. Probably 2 minutes, or something like that?

Q. Then you saw Starr coming?

A. Yes, sir; Starr and this man met right at the corner of Dodge's fence, at the northeast corner, I believe; or the northwest corner.

Q. I understood you to say you got out and went into the smokehouse?

A. Yes, sir.

Q. That smokehouse is a log smokehouse?

A. Yes, sir.

Q. It was the only log building that was around there, was it not?

A. It was the only building of any kind that was right there except the house.

Q. The house was not built with logs, was it.

A. I really don't know.

71 Q. You went in there because it was a log house?

A. I told you why I went in there. Mr. Hodge requested us to go in there.

Q. You thought the house was built with logs, and would make a good fort—or did you take that into consideration?

A. No, sir; I never thought about that.

Q. It was a log house?

A. Yes, sir.

Q. Did you carry your guns in with you?

A. Yes, sir.

Q. You expected Starr to come into the log house?

A. No, sir.

Q. Where did you expect him to come?

A. We thought he would ride up to the house as he was in the habit of doing.

Q. And come in?

A. No, sir; he never would come in the house.

Q. Did you expect that he would remain out there?

A. We expected him to come right up to the gate.

Q. Why not come into the house; because Mr. Dodge told you not to?

A. Why didn't we go in?

Q. Yes, sir.

A. Mr. Dodge told us there was children around there, and he was afraid some of them would get hurt.

Q. Now, I understand that when you found that he wasn't coming into the house, or near the house, that Floyd Wilson started for the horses?

A. Yes, sir.

Q. How far did he miss the house?

A. He missed it probably a quarter of a mile, possibly a little more; I don't know the distance at all.

Q. I will ask you if it was not between a quarter and a half a mile?

A. It was somewhere along in that neighborhood.

72 Q. I will ask you if Mrs. Walker, as you call her, Mrs. Padget now, was out of the house?

A. Yes, sir; she was out of the house.

Q. Did she go any nearer to them than the house during the fight at any time between Henry Starr and Floyd Wilson?

A. I don't know anything at all about that.

Q. You didn't see her go any nearer, did you?

A. I could not tell you anything about it.

Q. Did you see Mr. Dodge get any nearer than that stable during the time of that fight, when it was going on?

A. Yes, sir; he was considerably nearer at the time I left; he was probably 50 or 100 yards nearer; he was thumping that horse a considerable ways.

Q. Then Mr. Dodge was nearer to the fight than Mrs. Padget?

A. Yes, sir; she may have been there; I don't know. If she were at the house Dodge was nearer than she was, but I do not know where she was.

Q. I want to find out if Mrs. Padget remained at that house and Dodge was with you off 50 or 100 yards from the house nearer towards the place, if he was not 50 or 100 yards nearer to them than Mrs. Padget was?

A. I do not know where she was.

Q. I say if she was at the house?

A. If she was he was probably 50 yards nearer than she.

Q. Was there anybody nearer you saw to this fight than you people?

A. Nobody nearer at all; nobody nearer except myself and these two men.

Q. You were the closest man, of course?

A. Yes, sir.

Q. You rode down there?

A. Yes, sir.

73 Q. Your horse threw you—fell on you?

A. Yes, sir; fell down; tripped himself in the road.

Q. Floyd, at the first, you say, rode up to where you were at and you told him to stop?

A. Yes, sir; I told him to wait.

Q. But he paid no attention and rode on, and then Mrs. Walker told him to wait?

A. Yes, sir; Mrs Walker hollered at him to wait.

Q. Was he going at full speed?

A. No, sir; a little bit of short lope.

Q. Did he increase his speed afterwards?

A. No, sir; not at the time I saw him. I came out of the house and went back down to the stable.

Q. How far were you from the stable when he passed you?
A. I can not tell just how far.
Q. 50 or 60 yards?
A. Yes, sir; I should think possibly 150 yards; I don't know just how far it is down there.
Q. After he passed you going down there you walked 150 yards?
A. Oh, no, I didn't at all; there is an enclosure and stable lot there.
Q. I don't care anything about that enclosure——
A. Which is probably 150 yards after I got outside this yard fence before I got to where the horse was.
Q. If you went 150 yards from where he got his horse when he rode by you, you had to go back to the stable to get your horse?
A. No, sir; I didn't go to the stable at all.
Q. How far did you go?
A. I didn't go over 50 yards.
Q. Had they got the horse that far?
A. They had got him outside the stable and out into another enclosure there.
Q. The horse did not begin to buck until you got to it?
A. The answer that he made to me was that the horse would not
74 lead; I don't know what he had been doing before.
Q. You walked back 50 yards, got on the horse and he bucked and threw you; he fell?
A. Yes, sir.
Q. You then succeeded in getting him up?
A. Yes, sir.
Q. And then you got on him again?
A. Yes, sir.
Q. He bucked into a wire fence?
A. Yes, sir.
Q. That is twice that the horse was down?
A. Yes, sir.
Q. During this time Wilson was riding on towards Starr?
A. I presume he was; I could not see him at all at that time.
Q. You then got on your horse again, and Mr. Dodge commenced whipping him with a club, and finally got him started?
A. I got on him again. Now, I think I made that statement very plain, that we led the horse out of the enclosure around in front of the house, and I got on him again and Dodge had been whipping him with a club from the first to the last, and I got on him and he led him clear around outside through the gate.
Q. How far?
A. Probably 100 yards; something like that.
Q. During all this time while you were going back 50 yards to where the horse was and while you were struggling there with him, falling the second time, and leading him 100 yards, Mr. Wilson was riding down towards Mr. Starr. Now, then, when you got on the horse you looked down there and Wilson and Starr were together, were they not?
A. No, sir; they were not together.
Q. In 60 or 70 yards, and they were off their horses?
A. Yes, sir.

Q. That is the way they were?
A. Yes, sir.
Q. How was Wilson standing at that time? Where was his gun? You have told us where Starr's gun was, but you have said nothing
75 about how Wilson held his gun at that time.
A. He had his gun in a position it seemed like——
Q. I will ask you if he did not have it over his horse's withers, over his saddle?
A. He never had it in any such position at any time.
Q. That is, that you saw?
A. He never had it in no such position.
Q. You know that?
A. Yes, sir; I do know that.
Q. You are swearing to something you don't know?
A. I am swearing to what I know.
Q. How do you know he didn't have it there in that position before you looked?
A. As soon as I got on the horse I looked down there and saw them, and they were standing 50 or 60 or 70 feet apart; something like that.
Q. You saw them there; how do you know what happened between them; you didn't see that?
A. You are speaking about this killing, are you not?
Q. You know, sir, what I am talking about.
A. I am talking about the time this killing occurred.
Q. They both had their guns in about the same position. Now you say that Mr. Starr commenced getting his horse off?
A. No, sir; I never said that.
Q. He stood still, did he?
A. He was still as far as I could see; they were both still.
Q. Did he ever at any time while they were both standing there, before Floyd Wilson jumped on his horse and rode up to him, at any time, try to lead his horse on away, to get off?
76 A. I never saw him make a step towards leading his horse away.
Q. You saw him?
A. Yes, sir.
Q. You know whether he did or not; answer me yes or no?
A. I don't think he did.
Q. You say he did not?
A. That is what I saw.
Q. They were still standing there when Wilson remounted his horse?
A. Remounted his horse?
Q. Yes; did he not get on his horse again?
A. I never made any such statement as that.
Q. He didn't do it then?
A. If he did, I didn't see him do it.
Q. Did they get nearer to each other than 60 feet?
A. Yes, sir; they got considerably nearer. Starr was within six inches almost when he shot him the last time.
Q. Did they get any nearer to each other before the first shot was fired?
A. Not that I know of.
Q. Well, you ought to know; did they?

A. No; I told you, not that I know of, they didn't.

Q. They were 60 feet apart when the first shooting occurred?

A. Yes, sir.

Q. And you didn't see Floyd Wilson get off his horse at one time, and then get on and ride towards him?

A. No, sir; I never saw it that I know of.

Q. Are you willing to state that didn't occur?

A. I am stating here under oath just the way it occurred to me, and I am aiming to tell the truth about it as near as I can.

Q. What position were Floyd Wilson and Starr, when the first firing took place?

A. They were standing facing each other.

77 Q. Both standing up?

A. Yes, sir.

Q. You say that the first shot was fired by Wilson when he was standing?

A. Yes, sir; standing straight up, sir.

Q. What did he do immediately preceding the shooting?

A. He threw the gun to his shoulder and shot.

Q. At the time the defendant was standing with his gun down in the position you state?

A. Yes, sir.

Q. When Floyd Wilson fired upon him he was standing with it in that position with the muzzle down. He had not raised his gun up had he?

A. I think he was raising his gun. They shot very quick together, Colonel Clayton.

Q. Why have you not stated that before? Why did you not state it to the district attorney?

A. I stated it; that he had his gun in a position to shoot, and they shot pretty quickly.

Q. You stated that he had his gun down in this way, and you showed how he had it at the time that shot was fired. Now, do you mean to mend your holds, and say that he was raising his gun at the time he was shot at first?

A. I don't mean to mend anything. I am telling you just how it is.

Q. You didn't say that until I asked you the question. You put it the other way.

The DISTRICT ATTORNEY. He said they shot right almost together.

Mr. CLAYTON (of counsel for defendant). What were you showing the jury when you held the gun in your hands before?

A. I was showing the jury the position they were holding their guns when I first saw them.

Q. You were showing them the position the defendant was hold-

78 ing his gun when you first saw them?

A. Yes, sir.

Q. The question was, how he was holding his gun at the time the shot was fired, and you must have misunderstood it.

The DISTRICT ATTORNEY. I did not so understand the question.

Mr. CLAYTON (of counsel for defense). How was the defendant's gun? How was he holding his gun at the time that Floyd Wilson fired the shot?

A. It looked to me like he was bringing the gun up to his shoulder; just ready to bring it up.

Q. How high did he get it?

A. He got it up to his shoulder very quick; he fired very quick after the other shot fired. He held his gun in the position I now hold this gun.

Mr. CRAVENS (of counsel for defendant). When Wilson fired, that is the position he was holding his gun when you first saw them?

A. Wilson threw his gun up that way and fired, and just about that quick after that this gun fired.

Mr. CLAYTON (of counsel for defendant). I am not asking you that; I want you to show me the position of Henry Starr when Wilson's gun popped; you understand that, don't you? When his gun fired, when you heard the report of his gun.

A. It looked to me like he was bringing his gun up to his shoulder.

Q. What was his position?

A. In this way (indicating). It looked to me like he was bringing the gun up. I won't swear to that positively, for I can't do it. I will tell you as near as I can, for it was not a second hardly after Wilson's gun fired until Starr shot.

Q. It does not take a man a second to get his gun up when another man is shooting at him?

A. It didn't take him any longer.

Q. You admit that Wilson got his gun to his shoulder and fired
79 first?

A. It looked to me it hadn't any more got to his shoulder before he fired; I thought that he was firing too quick at the time.

Q. What do you mean by firing too quick?

A. I thought that he was not taking proper aim.

Q. You admit that Wilson fired the first shot?

A. Yes, sir; I admit that. He did fire the first shot.

Q. Did Henry Starr use his pistol?

A. Not that I know of.

Q. Do you know?

A. No, sir; I don't know.

Q. Do you know why Henry Starr threw his gun down? His gun was left there, was it not?

A. I don't know why he threw it down. I presume that he thought it was empty.

Q. His gun was on the field?

A. Yes, sir.

Q. Was it empty?

A. No, sir; there was a cartridge in it.

Q. It was hung, was it not?

A. No, sir. There was no cartridge hung in his gun.

Q. There was a cartridge in it not shot, was there?

A. Yes, sir.

Q. When did he throw his gun down?

A. He throwed his gun down immediately after firing into Wilson; when he run up over him he fired into him and threw that down and picked up Wilson's gun.

Q. Don't you know that he was firing his pistol the last time?

A. No, sir; I know that he wasn't; that is as far as I know. He did not use his pistol at Wilson.

Q. How many shots did Henry fire?

A. Well, now, I don't know how many he fired.

Q. How many did Floyd fire?

A. He fired four with his pistol and one out of his Winchester.

80 Q. You say that his Winchester only held 7 cartridges?

A. I think that is what it held.

Q. Are you certain about that?

A. Yes, sir; I believe I am sure of that.

Q. How many shots did Floyd have in his left leg?

A. I think he had two in his leg; I didn't examine him closely.

Q. I understood you to say 'while ago that he had three?

A. No, sir; I do not think I said that. Shall I show you and tell you again?

Q. You may point out where they were.

A. I told you that he had a shot in here, as I thought, and along up in above here, and one here, and then he was shot in through here, and one in here.

Q. That is the way you remember it?

A. Yes, sir.

The DISTRICT ATTORNEY. Didn't you say something about a glancing shot down about his ankle?

A. Yes, sir; his pants were tore down there, but I didn't examine.

Mr. CLAYTON (of counsel for defense). Did he have any shots in his right leg?

A. None that I know of.

Q. But they were in his left leg—all the shots that he received were in his left leg?

A. The shot in here went through the right.

Q. I am not talking about that; I am talking about his legs.

A. I am only too willing to tell you of anything I know about it and get rid of you.

Q. There was no shots in his right leg, but two shots in his left; I believe that is correct?

A. Yes, sir; I do not think there was any shots in the right leg.

81 Q. And in his arm?

A. No, sir.

Q. In what position was Floyd Wilson when he fired the last shot?

A. He was setting up—setting down on the ground.

Q. Was he sitting down or kneeling?

A. He was sitting down.

Q. I will ask you if he was not firing and rolling over and then raising and firing again and then rolling over?

A. No, sir; he never did anything of the sort—never did.

Q. You are quite certain of that?

A. I am certain. I am under oath here.

Q. You had some mud in the muzzle of your gun?

A. Yes, sir; in the breech; and I presume there may have been some in the muzzle.

Q. That is at the time when you jumped off the horse at the time when Henry Starr fired at you?

A. No, sir; I don't know that he fired at me then at all.

Q. You tumbled off your horse at that time backwards, did you not?

A. I never tumbled because I thought that he fired.

I asked you if you didn't tumble backwards.

A. No, sir; right off at the side I aimed to get off.

Q. What made your horse buck at that particular time?

A. Well, now, I don't know that; I don't know what made him buck the other time. If you will tell me what made him buck the first time I will tell you what made him buck the second time.

Q. I wish you could. When you shot did you shoot from under your horse's neck?

A. When I shot there was no horse near me.

Q. Were you standing or laying?

A. Standing up.

Q. Where was Henry?

82 A. He was starting away. He had just thrown his gun down and started to his horse.

Q. He had his back to you?

A. He had his side to me, was just turning around.

Q. Did you fire on him at all when he was facing you?

A. I will explain that again; I was trying to get my gun in order, trying to get a charge in, and I never done so until he turned around to go away.

Q. How far had he gotton before you fired?

A. Not a step; he had just turned around.

Q. He does not walk backward does he?

A. He went backwards—no; he turned around and went towards the horse.

Q. Was he armed at that time?

A. Well, now, I don't know whether he was or not.

Q. You had seen him throw down both of his Winchesters?

A. I never saw any revolver; I don't know whether he was armed or not.

Q. He had thrown them all down that you saw, and you fired on him?

A. I don't know whether he was armed or not.

Q. What you saw was while you were on your horse, was it? All this shooting occured while you were on your horse?

A. No, sir; this last shot was fired after I was on the ground.

Q. Which one?

A. The shot that killed Floyd Wilson, if you want to know.

Q. Then he fired at you once before he fired the last shot?

A. Perhaps he did.

Q. I am not talking about perhaps; did he?

A. I believe he did.

Q. Did you see him do it? What makes you believe it? That

83 is what I want to know?

A. I saw him make a motion of that kind. I didn't see any ball. I didn't see any, or it didn't hit me.

Q. Did you hollo at him?

A. No, sir.
Q. Didn't say anything to him?
A. No, sir.
Q. You had the writ?
A. Yes, sir.
Q. Floyd Wilson didn't have the writ, but you had it?
A. Yes, sir; he knew I had it though.
Q. Who knew it
A. Floyd Wilson.
Q. You have stated that before; Floyd had no writ, but you had the writ——
A. He was with me, and I presume it was just the same.
Q. You didn't say anything at all?
A. No, sir; not a word.
Q. You didn't say a word to either one of them?
A. No, sir; not a word. I didn't think it was any time to say anything.
Q. Did your horse buck with you any time between the time you got him started from Dodge's house until you got down in 100 yards of——
A. I kept him going as well as I could until I crossed over this little gulley; he never bucked.
Q. Did he go free?
A. No, sir; I kicked him, and hollered at him; done the best I could; but he never did go free at any time.
Q. And you did the best you could when you got across the gulley and he bucked again?
A. Yes, sir; he bucked as I turned in; I don't know what made him buck. I am not thoroughly posted about horses anyway.
Q. If I understand you now, if Henry Starr did shoot at you at that time, that was before he had fired the last shot at Wilson, was it not?
A. He may have shot when I was on the ground; I don't know.
84 Q. I am not talking about that; I am talking about when you were on your horse, the time that you believe that he shot at you first?
A. He done that, I think, sir; my best recollection is when he first run up on Wilson, when he started to run up on Wilson, when Wilson was laying down, was the first shot he fired at me. I told you that he stood in his tracks all the time this shooting was going on until Wilson fell on his back, and then is when he shot at me and run on Wilson.
Q. The point I am trying to get at is this ——
A. I don't understand you; if I knew what you wanted to get at I would tell you freely.
Q. The point I want to get at is this, you believe that this defendant fired a shot at you before you got off your horse?
A. Yes, sir; I think so.
Q. You think that is what made your horse buck, don't you?
A. No, sir; I didn't say that; I don't know whether that was it or not. I could not tell you what made the horse buck, for I do not know.
Q. That is when he fired the first shot at you?
A. I am not certain that he did fire the shot at me.
Q. But you think he did?

A. Yes, sir; that is right.

Q. I will ask you at that time if you did not tumble off your horse, raise up and fire a shot right under his neck?

A. No, sir; I didn't get off on that side of my horse; I went off on the side they were on, on the left hand side.

Q. How far was your horse from you at that time when you fired?

85 A. As I got off, as I fell, the horse got loose from me, I just let the bridle rein go.

Q. What has that to do with the question I asked you?

A. I don't know; I never looked to see where the horse was; ask me something I know and I will tell you.

Q. You stated a minute ago the horse was not near you?

A. I don't think he was near me.

Q. About how far was he?

A. I don't know how far he was.

Q. Did Starr fire at you after he fired the last shot at Floyd?

A. No, sir; not that I know of. He picked up that Winchester, and stood there pointing it at me, and it would not work, and he threw it down and ran.

Q. If he fired at you at all he fired at you before he fired the last shot at Wilson?

A. I think so.

Q. The last shot that was fired was fired by you, and he did not return that shot?

A. I don't know; if he did I didn't see it.

Q. But went off and halloed something back at you that you could not understand?

A. He was not saying anything, only yelling; wasn't using any language as far as I know, and beckoning for me to come on.

Q. You didn't go?

A. No, sir; I was afoot and I didn't go.

Q. At that time, as far as you know, when he was beckoning for you to come, the defendant was unarmed?

A. I had no way of telling; I could not tell anything about that. I will not state about that for I do not know.

Q. I say, as far as you know?

A. I won't make any answer for I don't know anything about it. He may have had forty pistols and I not know it; I do not know whether he was armed or not.

Q. You saw no pistol in his hand?

86 A. No, sir; I saw no pistol in his hand.

Q. You were in 100 yards of him; if he had had a pistol drawn you would have seen it, would you not?

A. As I said, I do not know whether he was armed or not. That is the only answer you will get out of me on that, for I don't know anything at all about that.

Q. I suppose you were not scared?

A. No, sir; not at that time I wasn't.

Q. You were not excited?

A. No, sir; not at that time; not a bit.

Q. You have got good sight?
A. Yes, sir; very good.
Q. And good hearing?
A. Yes, sir.
Q. I will ask you if he had had a pistol drawn in his hands you could not have seen it?
A. I think the only answer I can make to that is that I don't know whether he was armed or not. He had an overcoat on, and I could not say whether he had it buttoned, and I don't know what he had on his person.
Q. Where was Mr. Padget at that time?
A. I think, sir, he was across in the field plowing; I saw a gentleman plowing in the field over there; I don't know whether it was Padget or not.
Q. There was a gentleman plowing in the field?
A. Yes, sir.

Redirect examination by the DISTRICT ATTORNEY:

Q. What direction?
87 A. Almost west, or a little north of west, when I saw him. When I saw him he had unhi'ched his horses and was going towards the house when I saw him.
Q. You have learned since that was Mr. Padget?
A. Yes, sir.
Q. The question was asked you by counsel for the defendant where you met Wilson, and you said you met him in the Territory; had you ever met him before that time?
A. No, sir; I never was acquainted with Floyd Wilson until July last; I got acquainted with him here in Fort Smith; I met him a great many times from that time on up until December.
Q. Had he been with you at any time?
A. Well, no; we had been together a great deal here, but we never had done any work together.
Q. You knew where his home was?
A. Yes, sir; quite well.
The COURT. You met him here?
A. Yes, sir.
The DISTRICT ATTORNEY. They asked you awhile ago whether or not you agreed to pay Floyd Wilson anything at all or not?
A. No, sir; never agreed to pay him a cent.
Q. You said, I believe, that you were to bear his expenses?
A. I was to bear his expenses.
Q. What was Floyd to get for his services?
A. I told Floyd I would give him all the fees in the case, and if there were any reward offered he could have them, too; that I didn't want any money at all. That was the conversation, the agreement we had, and nothing else.
The COURT. And you spoke to him and requested him to go with you and assist in making the arrest?
A. Yes, sir; I asked him to go; called on him to go.
88 The DISTRICT ATTORNEY. You speak of going into the smoke-house there at Arthur Dodge's. Mr. Clayton asked you if you

went in there because there were logs there to protect yourself with. Was it your object to remain in the smoke-house if Starr came, or what did you intend to do?

A. We were to stay there until Starr came; he was supposed to come to the house.

Q. Then what?

A. We were to go out and get him. He was supposed to come in 50 yards of the house and we were going to call on him to surrender and take him. We did not expect any trouble. Could I state the instructions I gave the marshal, that is, in regard to this matter?

Mr. CLAYTON (of counsel for defense). No, sir.

The DISTRICT ATTORNEY. I don't know.

The WITNESS. I gave him instructions in regard to it.

Q. When were they given?

A. When we first started out, when we were waiting there, and expecting this boy to come ——

The DISTRICT ATTORNEY. I submit the matter to the court.

The COURT. Do you object to that, gentlemen?

Mr. CLAYTON (of counsel for defense). I suppose it would be competent.

The COURT. I think so; it is a part of the transaction. Words are just as much a part of the transaction as acts.

WITNESS. I told Floyd Wilson, instructed him, and we talked the matter over. I told him this: Now, don't kill this boy if possible to get along without it. I says, "We will call on him to surrender."

The DISTRICT ATTORNEY. Not to kill him if it was possible to get along without it?

89 A. Yes, sir; and Floyd said he would not. That was in case we got separated.

Mr. CLAYTON (of counsel for defense). Never mind what Floyd said; that is not competent.

The COURT. No; not what Floyd said; just your instructions to him. You were his chief and you had a right to instruct him, and whatever instructions you gave him in regard to the arrest at that time are competent.

Mr. BARNES (of counsel for defendant). That is when you first employed him?

A. I did not employ him at all.

Q. He wasn't in your employ?

A. No, sir.

The DISTRICT ATTORNEY. When you first called upon him, summoned him to go with you as a posse, or afterwards?

A. When I called upon him to go, after we got off.

Q. Do you understand the difference between employing a man and calling on him to go as a posse?

A. I understand what "employ" means. I was representing the Pacific Express Company, and have been right along, and I never hired anybody to go, but summoned him as a deputy United States marshal to go there with me and make the arrest, and I did not employ him at all.

Witness excused.

90 ARTHUR DODGE, having been duly sworn, upon behalf of the Government, was examined by Hon. James F. Read, the district attorney, and testified as follows, to wit:

Question. What is your name?
Answer. Arthur Dodge.
Q. Where do you live?
A. In the Cooweescoowee district, Cherokee Nation.
Q. Are you a citizen of that nation?
A. Yes, sir.
Q. How long have you lived there?
A. I have been there about 12 years this last time.
Q. Do you know Henry Starr?
A. Yes, sir.
Q. Where does he live when he is at home? Where does he call his home? Do you know?
A. He lived about all the time with his mother.
Q. Where is that?
A. It used to be right up on a creek, about a couple or three miles from me.
Q. How long have you known him?
A. Well, I think probably about 7 or 8 years.
Q. Were you acquainted with Floyd Wilson?
A. No, sir; I never was acquainted with him until he came out into that country.
Q. He did come up there, did he?
A. Yes, sir.
Q. Do you know of his death?
A. Yes, sir.
Q. How long before his death was it that you saw him; before he was killed?
A. The first time I saw him was two nights and one day, I believe, before his death, and up to noon in the second day.
Q. Where did you see him first?
A. He come to my house one morning.
91 Q. Who was with him?
A. A man by the name of Dickey and a man named Gabriel.
Q. How long did they remain at your house?
A. They staid there, I presume, about half an hour.
Q. What night was that?
A. I just forgot the night of the week.
Mr. CLAYTON (of counsel for defense). About what time in the night?
A. I think somewhere about midnight, or probably a little after. It was away late in the night.
The DISTRICT ATTORNEY. About how long before the killing was that?
A. I think that was two nights and one day and about half a day, as near as I can remember.
Q. If the killing was on Tuesday that would be Sunday—Sunday night—would it not?
A. Yes, sir.
Q. You say they remained there about half an hour?

A. Yes, sir; they seemed to be very wet and cold; it was snowing. They wanted me to get up and make a fire for them to warm by.

Q. Do you know what their object on that trip was?

A. They said they were going to Lipsey's and got lost.

Q. Did they say who they were looking for?

A. Yes, sir; they were looking for Henry Starr.

Q. Did you direct them how to go?

A. Yes, sir; I told them how they could go.

Q. When did you next see them?

A. The next morning, about the time we were going to set down to breakfast.

Q. They came to your house?

A. Yes, sir.

Q. All three of them, or just two of them?

A. All three of them.

Q. How long did they stay there after that?

92 A. They staid until after they got their breakfast, and I think that man Gabriel left after they eat breakfast, as near as I can remember.

Q. Did they remain there all that day, Dickey and Wilson?

A. Dickey and Wilson, I think, remained there about all the time, if I remember aright.

Q. Did you see Henry Starr that day?

A. I saw him late that night.

Q. About what time?

A. It was about dark.

Q. Were the lamps lit in your house?

A. Yes, sir.

Q. Now, tell what you saw, and what occurred there at that time.

A. Well, I saw Henry coming right up along the fence around west.

Q. Where were you?

A. Down at the stable, at my stable, and he came right along, had a gun, looked like, laying down across his lap, came right along around the house, looked like he was looking at the ground, right-hand side, and then turned his head towards the house, like he was looking in at the window, and then he turned his horse and went back a little peice, and then went back in the other direction, southeast direction.

Q. He came looking towards the ground?

A. Yes, sir; like he was looking at the ground.

Q. Did he stop in front of your gate?

A. Yes, sir; he sort of halted.

Q. And looked in towards the window?

A. Yes, sir.

Q. Could he see anyone sitting in the window?

A. I presume he could.

93 Q. Who was in the room at that time, in the house at that time?

A. Well, when I went from the stable up there Dickey and Wilson and my children and a woman named Mollie Black was in the room when I went up there from the stable.

Q. Do you know whether Wilson and Dickey were either one sitting near the window or not?

A. Well, when I got up there they were sitting between the window that had the door in it and the wall.

Q. Could they have been seen from the road, anyone looking into the window?

A. Yes, sir; I think they could be seen.

Q. Henry rode up, looking along on the ground, you stopped and looked into the window?

A. Yes, sir; looked like he was looking in towards the window.

Q. And then did he ride on before he turned back?

A. Yes, sir; it looked like he started to go to the big gate out there at first, and then turned it looked like—he checked, turned and went a piece and then turned and went south or southeast direction.

Q. When he turned around and went back, was he looking on the ground then?

A. I think he looked at the ground; I think he looked back towards in the house; it looked like he looked both ways.

Q. What did you do then?

A. As soon as I got the corn out of my arms I went to the house.

Q. Did you state to Dickey and Wilson what you had seen?

A. Yes, sir.

Q. What did they do then?

A. They got up and looked like they started to go to hunt him.

Q. Did you tell them where you thought he was going?

94 A. Yes, sir; I told them where I thought he would be apt to go.

Q. Where was that?

A. At Zane's, there across California Creek.

Q. Which way did they go? Did they follow after him, or go around in another direction?

A. No, sir; they went down behind my barn after they got their horses, and went north of the field.

Q. You went with them a part of the way?

A. I went with them and showed them where the gate was.

Q. Was that the proper direction to go and show them in order for them to intercept Starr? Was that the proper direction to go to head him off?

Mr. CRAVENS (of counsel for defendant). That is very leading.

The DISTRICT ATTORNEY. I submit it is leading. (To witness.) How would you go if you wanted to intercept Starr, if he was going to Zane's, what direction would you go?

A. I would have went the same way they went.

Q. How long were they gone, or did they return to your house after that?

A. Yes, sir; they came back.

Q. In how long a time?

A. I think probably a couple or three hours.

Q. Where did they remain that night?

A. At my house.

Q. The next day where were they?

A. They were about my place there almost all the forenoon; I think they were there all the for'noon; I don't think they left there hardly at all, that I can remember of.

Q. Do you remember a stranger coming up there while they were there, a man riding up on horseback?

A. Yes, sir.

95 Q. Who was that?

A. A man named West.

Q. Where were Dickey and Wilson at the time he came up?

A. They were up in the barn loft.

Q. When had they gone up there?

A. Some time before that; I don't know just exactly how long; I don't hardly remember.

Q. But they were up there at that time?

A. Yes, sir.

Q. Did you see Henry Starr that day, after that man West came up?

A. Yes, sir.

Q. What time was that?

A. That was some little bit after West had come there.

Q. About how long after West had left?

A. Probably a quarter or half an hour after West come there. West came there and staid there and talked quite a long time.

Q. After West rode off, how long after he rode off before you saw Starr?

A. I really saw him before West rode off, and then I noticed, of course, which way he was going, and when West rode off I told them boys that Henry was coming I guessed, and on the other side of the field there.

Q. What did they do?

A. They come down out of the loft and went to the smokehouse.

Q. Why did they go to the smokehouse?

A. I think the reason why they went there I told them I didn't want them to go in the house, because I was afraid they would kill some of the children. I told them I thought there would be some trouble, and I didn't my children hurt.

Q. Do you know whether or not Henry Starr at that time was scouting or not?

A. That was the supposition of that country up there, that he was scouting; the talk of the country.

96 Q. Did you ever have any conversation with him on the subject?

A. No, sir; I never talked with him and about his scouting at all.

Q. Did you ever have any conversation with him about whether the marshals were looking for him or not?

Mr. CLAYTON (of counsel for defendant). He can not prove that by supposition at all.

The DISTRICT ATTORNEY. Did you ever have any conversation with him about the marshals looking for him?

A. No, sir; I do not think I did.

Q. Did Starr ever make any statement to you about the marshals looking for him, or being after him?

A. Yes, sir. Well, I do not know that he made it to me, but I think I heard him say at my house that the marshals were hunting him, but I don't know whether that was talk to me any more than to anybody else.

Q. That was before this difficulty?

A. Yes, sir.

Q. Then it was at your request that Mr. Dickey and Wilson——

Mr. CRAVENS (of counsel for defense). He did not say that. He requested them not to go in the house.

The DISTRICT ATTORNEY. Did you say anything about requesting them to go to the smoke house?

A. I asked them not to go to the house. I won't be positive about requesting them to go into the smokehouse. I think I told them there was a smokehouse there that they could get behind, but I requested them not to go in the house for fear they might get to shooting in there and shoot some of the children.

Q. What did Starr do? Did he come up to the house?

A. No, sir.

Q. How near to the house did he come?

97 A. I should thing between three and four hundred yards.

Q. You made a plat of that ground when you were down here before?

A. Yes, sir.

Q. What is the distance from your house to your stable?

A. I think 40 or 50 yards, or close to it.

Q. Could you make a map of your residence and the fields there?

A. Yes, sir.

(Witness draws a plat of the surroundings of the place of the killing, as requested, which plat is exhibited to the jury by the district attorney.)

Q. What direction was Starr coming from when you saw him?

A. He was coming from the east, going pretty much west. He was pretty much on the east side of the field when I saw him.

Q. Could Starr see your house from where he was when you first saw him?

A. Yes, sir.

Q. Did these men go to the house?

A. When I spoke to them about seeing Starr over there they got down and went towards the house then.

Q. Where did you see them? Did you see where they went to?

A. No, sir; I didn't look to see right where they did go to. They were up in the loft at the time I told them. I could hear them talking up there. It sounded like they were 5 or 6 feet back in the loft. I did not look to see where they were.

Q. You told them that Starr was coming?

A. Yes, sir; I told them I saw Henry coming over there on the other side of the field. That is about what I told them, as well as I remember now.

Q. They got down and went up there?

A. Yes, sir.

98 Mr. CRAVENS (of counsel for defendant). Went to the house; did not the witness say?

The WITNESS. Yes, sir; I think they went to the smokehouse.

The DISTRICT ATTORNEY. What did you do?

A. I Staid on to my work there.

Q. Where did you next see them, or either one of them?

A. Just in a very few seconds, Wilson coming running down from the stable, calling for the horses; ordered some horses saddled.

Q. Who was down there with you?

A. Emmett Miller got there about that time, a young fellow that worked on the farm above there.

Q. What did you do?

A. Emmett started to get the horses out for him and I started to get out a saddle, and by the time we got started he went along to where my horse was; I had just rode my horse in before that, and he ordered me to get him for him, and I told him I didn't want him to ride my horse. I was afraid he would get him killed; and he said he didn't care, he wanted to ride him; he wanted to get to that man before he got to them hills. I led my horse out; he was standing there saddled and bridled, and by the time the horse was out he was on him and he started to go.

Q. What did you do about the other horse?

A. We went ahead and saddled up the other horse as he rode off; he told us to get that other horse saddled; he said he wanted him for Mr. Dickey.

Q. Did you start with him to take him up there to Dickey?

A. Yes, sir.

Q. Why didn't you take him?

A. He wasn't very takeable; he didn't want to go very well.

Q. He would not lead, you mean?

99 A. Yes, sir; he would not lead very well. He was sort of stubborn.

Q. What became of Dickey then?

A. He came down and met us and got on the horse.

Q. Where had you gotten the horse to by the time that Dickey got there?

A. Got him out of that first gate there by the barn.

Q. About how far was that from the house where that gate was?

A. I think it was 25 or 30 steps was the distance.

Q. From the house?

A. Yes, sir.

Q. To the gate?

A. Yes, sir.

Q. Did Dickey get on the horse?

A. Yes, sir.

Q. Did the horse go with him?

A. No, sir.

Q. What did he do?

A. He reared and plunged around there a little bit, and then fell down.

Q. Did he fall with him more than once?

A. Yes, sir; he got off of him, and he got up and he got on him, and he played the same trick over again when he went to make him go.

Q. Did you finally get the horse off?

A. Yes, sir.

Q. How did you do that?

A. Picked up a chunk of barb wire that there was and went to whipping him.

Q. The horse finally went, did he?

A. Yes, sir.

Q. You followed our after the horse still whipping him?

A. No, sir; I just went two or three steps; Emmett and me went up to the big gate.

Q. What direction did Dickey go?

A. He went the direction of where Wilson and Henry Starr were.

Q. After Dickey got started off which way did you look?

A. I kept watching Henry and Wilson.

Q. Tell what occurred, what you saw?

100 A. I saw Wilson ride up pretty tolerable close to Henry, I could not tell just exactly how close to him, stop and get down, and they stood there, looked like they were parleying awhile, talking apparently.

Q. Was Starr off his horse?

A. Yes, sir; he got off about the same time that Wilson got off; Wilson got off and he got off.

Q. Could you hear what they said?

A. No, sir.

Q. Could you hear that they were talking?

A. Yes, sir; I could tell they were using words, that there was words going on between them, but I could not tell what it was.

Q. You could not distinguish the words?

A. No, sir.

Q. What kind of a day was it?

A. It was a very nice day, calm day.

Q. What kind of a night had it been before?

A. Wet, open night; the fact was, it had been snowing and storming two nights before.

Q. It was quite a nice day, you say?

A. Yes, sir; it was a very quiet and a nice day.

Q. You could hear them talking could you, but you could not distinguish the words?

A. Yes, sir; I could hear a conversation going on between them, but I could not tell what was said at all.

Q. State what occurred then?

A. They stood there parleying awhile, apparently, and then Henry looked to me like he was trying to work off, like he wanted to get his horse to go on, work off away from Wilson, and he looked to me like he had gone three or four steps and then Wilson got on his horse and rode right up close to him, and got down again. He got on the horse that he had got down the second time.

Q. What occurred then?

A. They stood there parleying again, apparently, for a second or two.

101 Q. How were they standing?

A. About face to face, or something near it.

Q. Did they have their horses with them?

A. Yes, sir.

Q. Could you see whether they had their bridle reins over their arms or not?

A. Henry looked like he had his arm over his bridle rein, and Wilson apparently had his by the left hand.

Q. How did they have their guns?

A. They both had their guns raised up sort of about opposite to each other.

Q. Will you take the gun I now hand you and show about how they held their guns?

A. About this way [indicating]. I could not tell just exactly. I was not close enough to tell just exactly.

Q. Your idea was that they had them something in that style?

A. Yes, sir; it looked like each gun pointed towards one another. They had their guns sort of up in front of them, looked like each man had his gun pointing towards the other man. I don't know how close they had the butt of their guns to them, or anything of that kind, or just exactly how they were sighting, or anything of that kind, but they were up in front of them.

Q. Do you know whether they had their guns to their shoulders?

A. No, sir; I could not tell that either one of them had their guns to their shoulders exactly.

Q. When you refer to guns do you mean pistols?

A. No, sir; I mean a gun like that one there.

Q. Winchesters?

A. Yes, sir.

Q. What occurred then?

A. They parleyed there a little while and Wilson looked like raised his gun higher and shot.

Q What did Henry do?

A. He threw down his gun and shot.

102 Q. What direction did Wilson shoot?

A. The smoke was considerable up in this direction; looked to me like it was away above Henry's head, to look at the direction of the smoke.

Q. What direction did the smoke go from Henry's gun?

A. It went down near the ground; looked like it would not go where Wilson was; it looked like it would go into the ground before it got to Wilson, is the way it looked.

Q. Wilson was standing at that time, was he?

A. Yes, sir.

Q. What occurred then? How close were those shots together?

A. Henry's was a little piece behind Wilson's; not so far, just a little breath behind him. About that way [indicating].

Q. About like that [snapping fingers]?

A. Yes, sir; a person could tell there was a difference, you know, but not enough to amount to anything.

Q. Very close together, then?

A. Yes, sir; reasonably close.

Q. What was done then; what occurred then?

A. Wilson fell when Henry shot.

Q. How did he fall?

A. He fell right down on the ground.

The COURT. That is, when Henry fired his first shot?

A. Yes, sir.

The DISTRICT ATTORNEY. Did he get up again?

A. Yes, sir; he jumped up and jumped up immediately; it didn't look like he was hardly checked at all before he was on his feet again.

Q. What did he do then?

A. He fired again, it looked like, as quick as he could.

Q. Do you know what he fired with then?

A. No, sir; I don't know. The smoke got pretty thick there then. You could not tell as much about it then.

103 Q. What occurred then? Did the shooting become general then?

A. Yes, sir; tolerably; and Henry shot again right away after Wilson shot the second time.

Q. What became of Wilson then?

A. He fell down again.

Q. How did he fall?

A. About the same he did the first time; dropped down to the ground.

Q. Did he get up again?

A. No, sir; I never saw him raise up any more; that is, to raise up at all. I could see him move, but I could not see him raise up at all.

Q. How was he moving?

A. He was rolling over towards Henry and shooting.

Q. What was Henry doing?

A. He was shooting about every time that Wilson shot.

Q. Was he standing still or moving up to Wilson?

A. He commenced moving towards Wilson when Wilson got to going towards him.

Q. You speak of Wilson's going towards him, saw him roll over; how far did he go in that direction do you suppose?

A. It looked to me like he might have turned over two or three times during the time that he was shooting. It seemed like that he rolled over every time he shot.

Q. Henry, you say, was advancing on him?

A. Yes, sir; he commenced advancing on him.

Q. Who stopped firing first?

A. They both seemed to stop about the same time.

Q. Who fired the last shot?

A. I think Henry fired the last shot.

104 Q. Go on and describe how that was.

A. After they shot a few shots apiece they stopped shooting, and then in just a second or two I saw Wilson roll over and shoot again, and Henry he sort of shot.

Q. Then what did he do?

A. He run right up over on to Wilson and shot.

Q. Did he have his gun in his hand, or Winchester, when he shot, or what did Henry have?

A. Henry did, yes, sir; when he was going towards Wilson at that time it look like he had his gun back this way; I thought he was going to hit him with the gun, the way he started; but when he got close enough up to him the gun went off.

Q. How close was he to him when the gun went off?

A. It looked to me to be almost over him.

Q. Did you see Wilson fall on his back? Was Wilson laying on his back when Henry shot him?

A. I don't know whether he was laying on his back when Henry shot him or not. He was laying on his back when I saw him next.

Q. Was he laying down when Henry shot him the last time?

A. He was laying down all the time from the time the second shot was fired by him.

Q. Was he laying still at the time that Henry shot him?

A. I could not tell you whether he was moving or not; I could not tell you anything about that; I saw him rolling over and shooting. I don't know whether Wilson was in motion or not after Henry shot.

Q. Was it after Wilson fired the last shot that Henry ran up over him?

A. Yes, sir.

105 Q. How long after the last shot fired by Wilson was it before Henry fired his last shot?

A. Just after it; you might say a slight breath; it looked like it was as quick as it could be done.

Q. Do you mean that he did not start to run until after Wilson had fired his last shot?

A. I don't think he did; I think about the same time that he did that he ran. That is the way it looked to me.

Q. Ran up to him, poked the gun down, and fired?

A. Yes, sir; looked like he was going to hit him at first with the gun, but when it came down I could hear it go off.

Q. What occurred then? Where was Dickey at that time?

A. He was going up in that direction.

Q. Did Henry Starr fire at Dickey?

A. Yes, sir; after he left Wilson and went off he fired back towards Dickey.

Q. Was that before Dickey had fired at Starr?

A. Yes, sir; before Dickey had fired at Henry.

Q. Was it after he had fired at Wilson the last time that he shot at Dickey?

A. Yes, sir.

Q. Do you know whether he fired at Dickey before that time or not?

A. I could not tell you; some of these shots that he was firing might have been at Dickey, for all I know. Dickey was going right in the same direction.

Q. Then some of those shots might have been fired at Dickey?

A. I could not say what they were fired at; they were shot.

Q. Dickey never fired at Starr until after Starr had fired at him?

A. No, sir; I believe not.

Q. Where was Dickey standing when he fired?

A. He was going towards Henry. When Henry left he went

106 towards my horse; when he left he went towards my horse instead of his horse.

Q. Starr's horse and Wilson's got away from them during this shooting?

A. Yes, sir; Starr's horse and mine; Wilson was on my horse.

Q. Starr had his own horse there?

A. Yes, sir. But he got away from him and Wilson had my horse, and he got away from him. When Henry left Wilson he went towards my horse.

Q. That was after the shooting?

A. Yes, sir.

Q. Where was Henry standing when he fired the shot at Dickey?

A. He was running in the direction of my horse from where Wilson lay; I don't think he stopped; I think he sort of shot as he ran, as near as I can remember, sort of turned his body and shot as he was going.

Q. When was it Dickey shot at him?

A. Dickey shot at him right straight after that.

Q. Do you know what Wilson shot with at that time?

A. I think it was a six-shooter, from the looks of it.

Q. Where was Henry's gun when you went up there?

A. It was laying across aways on the ground, very near Wilsons head.

Q. How far from his head?

A. About that far (indicating about three feet).

Q. What direction was Wilson's head lying?

A. About a southwest course, pretty much southwest; I think it was just about southwest.

Q. When Wilson and Starr were facing each other which way were they looking?

A. Henry would be facing somewhat southeast and Wilson southwest. One would point that way, and the other right that way.

107 Q. How close together were they when you first saw them?

A. When I first commenced looking at them neither party hadn't got stopped at all yet; they were both going.

Q. When they dismounted the first time how far apart were they?

A. I think they were something over 100 yards probably.

Q. When they got up together when the shooting began how close together were they?

A. I don't think they were as far apart as this room.

Q. About how far were they apart?

A. I think 25 or 30 fert probably, if it was measured. I never measured it. It is all guess work with me; I never measured it at all.

Q. Were their horses by them when they commenced firing?

A. Yes, sir; when they first commenced shooting.

Q. How were their horses standing?

A. Henry's horse was sort of behind him and to the northwest of him. And Wilson's horse's head was right pretty near up against his body. He had hold of his ho'se with his left hand, and the gunstock at the same time, it looked to me like.

Q. How is that about the gunstock?

A. It looked to me like he had the bridle rein and gunstock in the same hand; it looked like that.

Q. What did Henry say or do after he mounted his horse or started to run off?

A. I never was close enough to him to tell.

Q. Did you hear him yell or whoop?

A. No, sir; I do not remember of hearing him.

Q. You don't remember of hearing him say anything?

A. No, sir. He went and rode off in the way he had been going before he stopped the first time.

108 Q. How did he g'?

A. He went off in a lope.

Q. What time in the day did you say that was?

A. I think it was somewhere near noon time of day, about 12 o'clock, in the day time, as near as I can remember.

Q. Did you see Henry Starr after that?

A. Some two weeks or more I saw him.

Q. Where did you see him?

A. He came close to my house.

Q. At what place?

A. Right where I lived.

Q. Where did you meet him, on the road or prairie?

A. No, sir; I was bringing some cattle out of the stock field.

Q. Did you have any conversation with him at tha' 'ime?

A. No more than he said he come to tell me where he had left my horse which he had rode off.

Q. Where did he say he left it?

A. Out in the Osage Nation.

Q. Did he say anything to you at that time about letting people have your horses?

A. He said he didn't like me to let the marshals have my horses; that that was what caused him to get into the trouble; that he thought it was some of the boys there that was on the horse, or he wouldn't have had this trouble, or something about that effect. I don't remember just the words that he did use, but something to that effect. It wasn't much one way or another.

Q. You say he 'aid to you not to let the marshals have your horses any more?

A. Yes, sir; he said something about not letting them have them any more.

Q. That he thought it was some of your boys coming?

A. Yes, sir; and he said that was what got him into the trouble.

109 Q. How did it get him into trouble?

A. I presume——

Mr. CLAYTON (of counsel for defense). Never mind presuming; just state what he said.

The DISTRICT ATTORNEY. I will ask you if he did not state this, in order to refresh your memory——

Mr. CLAYTON (of counsel for defense). Is that competent, your honor?

The COURT. Certainly, in order to refresh the memory of the witness. You have done it a hundred or thousands of times yourself.

Mr. CLAYTON. You can refresh his memory, of course, if he has the paper before him.

The COURT. After he has gone over the subject-matter about which he is asking him, if he thinks there is something else, he has a right to refresh his memory, just as you have done thousands of times when district attorney.

Mr. CLAYTON. I disagree with your honor about what I have done.

The COURT. That does not make any difference. I do not presume you would do anything that was illegal as an officer of the Government.

Mr. CLAYTON. I would not do anything that way anyway.

The DISTRICT ATTORNEY. Did he not state to you "I hated like hell to have to ride your horse off, but could not do any better. I was afraid the whole damned country was alive with marshals?"

A. Yes, sir.

Q. "I took you and Miller to be marshals?"

A. Yes, sir; I believe he did.

110 Mr. CLAYTON (of counsel for defense). We save an exception.

The COURT. To what?

Mr. CLAYTON (of counsel for defense). To the manner in which that question is put, and the answer thereto. It is a leading question.

The COURT. Objection is made because it is a leading question and the court admits the question because the district attorney offers it as a method of refreshing the memory of the witness.

The DISTRICT ATTORNEY. I will ask you if he did not say this in addition: "After this I don't want you to let any other damned marshal get on your horse as long as he lives. Your horse is what fooled me. I thought it was some of your boys coming out there."

Mr. CLAYTON (of counsel for defense). We object to that.

The COURT. It is objected to because it is leading, and it is admitted because it is offered by the district attorney by way of refreshing the memory of the witness.

The DISTRICT ATTORNEY. I will ask you if he said this in addition: "That is what fooled me. I never knew any different until he got pretty close to me?"

A. Yes, sir.

Mr. CLAYTON (of counsel for defendant). We object to that, and save an exception for the reason as before.

The COURT. Yes, sir.

The DISTRICT ATTORNEY. Did you yet your horse back afterwards?

A. Yes, sir.

Q. How long afterwards?

A. I got him back some time this summer; I have forgotten the date exactly.

Q. Was it before or after Henry's arrest you got your horse back?

A. It was after his arrest.

111 Q. Do you know where Henry went, what became of him? Did you see him any more after that?

A. I seen him several times passing backwards and forwards over the country; I never was anywheres close to him; I was at a distance.

Q. Was he armed or unarmed when he was riding around?

A. He had a gun all the times I saw him.

Q. Do you know whether he ever left that country after that or not?

A. No, sir; I could not tell you whether he ever left or not.

Q. Did you see him about there?

A. I saw him passing through the country at different times at a distance, but I never saw him anyways close.

Q. Do you know whether he avoided the marshals after that?

A. I don't know it myself at all, only from hearsay.

Q. Did you ever hear him say anything about it after that?

A. No, sir; I never was close enough to him to hear him say that.

Cross-examination by Mr. W. H. H. CLAYTON:

Q. How far is it from your house to that place, to where the shooting was done?

A. I think it was between three and four hundred yards.

Q. I will ask you if you saw Wilson after he was shot?

A. Yes, sir.

Q. Please state if he was powder-burned anywhere?

A. Not that I seen.

Q. If he had been you would have seen it, wouldn't you?

A. Yes, sir.

112 Q. This wound in the breast that he had, was there any powder-burn on that?

A. I don't think there was; I didn't see anything that looked like powder-burn.

Q. These men were at your house; I understand you that they came there on one Sunday night, and that they were there up to the time of the killing with the exception they went away on the same night that they came and came back the next morning; they got in that loft on Tuesday, and Tuesday is the day of the killing; what did they go to the hay-loft for?

A. They went there when they seen that man West coming. They didn't want whoever it was to see them.

Q. Did they think that was Starr?

A. No, sir; they thought maybe it was somebody Starr had to come to see who was there.

Q. So they got up there and hid themselves, and you and this man were down there talking?

A. Yes, sir.

Q. How long?

A. A quarter or half an hour I think it was; it was quite a little bit that he staid there; I didn't notice the exact time.

Q. Did you tell him that these men, Dickey and Wilson, were there?

A. No, sir.

Q. You kept that quiet?

A. Yes, sir.

Q. How far did you go with them the night before when you saw Starr go down?

A. I went from that barn to the pasture fence there on the map [indicating]. I think that is 250 or 300 yards from the stable.

Q. You were at the stable and you saw Starr coming, and you told these men who were up in the haymow that he was coming and they then got down and went out towards your smokehouse?

113 A. I told them something about the smokehouse, but I don't know exactly what it was.

Q. They left, and in a short time after that Floyd Wilson came running down to the stable, and told you to get the horses out, and to do it quick?

A. Yes, sir.

Q. That was his exact language?

A. He called to Emmett Miller, and he said, "Young man, get that horse as quick as hell will let you," and he said, "Dodge, get out that saddle and saddle him. We want that horse as quick as you can get him."

Q. You then went to work saddling the horse?
A. Yes, sir.
Q. You had a horse in there already saddled?
A. Yes, sir.
Q. The one you had ridden in there, your horse?
A. Yes, sir.
Q. Then he made you bring that horse out?
A. Yes, sir; he ordered me to do it.
Q. You brought it out?
A. Yes, sir.
Q. And he got on him and went off at once?
A. Yes, sir.
Q. Did he go in a run?
A. Yes, sir; he went in a pretty fast gait.
Q. You went on then and saddled up the other horse?
A. Yes, sir.
Q. The horse that Dickey had rode?
A. Yes, sir; the horse that he started to ride, and did ride it.
Q. The horse was balky?
A. Yes, sir.
Q. How far did you say you got him?
A. Got him out there to the first gate when Dickey come down.
Q. You had a great deal of trouble in getting him out there?
A. Yes, sir; I had a little trouble but not so very much either; he didn't want to go.

114 Q. You got him out of the gate; that was west from where Starr was, was it not?
A. Yes, sir; it would be west from Starr.
Q. And it was between these two gates, here, that Dickey met you?
A. Yes, sir.
Q. What was it made the horse buck?
A. I could not tell you.
Q. Did Dickey have spurs on?
A. Yes, sir; he had spurs on his feet.
Q. Did Wilson have his spurs on?
A. I don't know whether Wilson had spurs on or not, but Dickey did.
Q. How do you remember that Dickey had spurs on?
A. Because he was spur'ing the horse, trying to make him go.
Q. The horse fell with him twice, I believe you say?
A. Yes, sir.
Q. And he finally got up on him?
A. Yes, sir.
Q. Where had you gotten by that time?
A. Gotten pretty much up to the second gate; you might say right at the gate about, by the time the horse got good started.
Q. Did you pass through the gate?
A. No, sir; Dickey passed through the gate without us.
Q. Did you stand there looking at him?
A. No, sir; we went right on out of the gate.
Q. On to the prairie?
A. Yes, sir.

Q. Where this shooting occurred?
A. No, sir; not where it occurred; out from the house.
Q. On the same prairie?
A. Yes, sir. It is not enclosed there.
Q. You looked across and saw these things you have detailed?
A. Yes, sir.
115 Q. You say you saw Wilson ride on down towards where Starr was?
A. Yes, sir. He was just about in the act of stopping when I got to where I could see them good.
Q. Who got off of his horse first?
A. As near as I can remember Henry got off his horse first.
Q. Are you certain about that?
A. I am not real positive, but I think he did.
Q. They stood there, off their horses, some time?
A. A few seconds, a very few seconds. The whole business was done in a very few seconds.
Q. How long do you suppose it was after Wilson first stopped until the shooting was over? How long a time?
A. I don't know; a very short time.
Q. Three minutes?
A. I could not tell you exactly how long it would be. It would be a very hard matter to give it.
Q. It was a very short time?
A. Yes, sir; they were not standing there long; no great while, for the whole thing was done in a few seconds; they could not have been standing there long.
Q. Wilson got on his horse and got off the second time; is that correct? Before Wilson got on his horse again, and run on the second time?
A. They just merely did halt a very little bit before Wilson got on his horse the second time. They got down and Wilson started to get off——
Q. You stated before that Henry started to get off, and got his horse about 4 steps, three or four steps, you said, when Wilson jumped on his horse and rode on to him again?
A. Yes, sir.
Q. They were about 100 yards apart when they first got off
116 their horses?
A. I think they were.
Q. Wilson then got on his horse and rode in a lope?
A. Yes, sir; looked like he was in a lope.
Q. Up to within 25 or 30 feet of where Henry Starr was standing?
A. Yes, sir; I think so.
Q. Then he stopped and got off his horse again; is that right?
A. Yes, sir.
Q. How long did he stand after he got off his horse, before he fired?
A. Just a very few seconds.
Q. Did he jump right off his horse and fire?
A. No, sir; I think not.
Q. Jumped right off his horse and fired in a few seconds?
A. Yes, sir; I think so. It looked to me like there was a pause.
Q. What position was he when he fired?

A. He was standing on the ground.

Q. Standing straight up?

A. Yes, sir; I think he was.

Q. Are you certain of that? Don't you know that he was squatted in this position, with his left foot out in front, and his leg out in front, when he fired that shot—jumped off the hors' and squatted and fired that way?

A. No, sir; I don't know it.

Q. What do you say about it?

A. I say I think he was standing up.

Q. Was he in that position at any time, squatted with his front leg out, the leg in which he received the shot? And that was the left leg, was it not?

A. Yes, sir.

Q. Was he at any time in that position?

A. Not that I noticed, he wasn't.

117 Q. You don't know?

A. No, sir.

Q. You did observe that he received his shots in his left leg, didn't you?

A. I noticed that after I was up there when he was dead.

Q. Wilson fired a shot that had the appearance of going up?

A. Yes, sir.

Q. And that the defendant fired a shot that went into the ground?

The DISTRICT ATTORNEY. He did not say that it went into the ground.

The WITNESS. I only talked about the direction that the smoke went. The smoke appeared like it was going into the ground before it got to him.

Mr. CLAYTON (of counsel for defense). I do not suppose you saw the ball. You saw the smoke go towards the ground between the two.

A. Yes, sir. It looked like it wouldn't go to him.

Q. I will ask you if, at the time that Wilson fired, if Henry's horse didn't begin jerk him, and wasn't jerking at the time he fired the first shot? He had his rein over his arm?

A. Yes, sir; I think the horse jerked him. Both horses got away——

Q. At the time that Wilson fired the first shot, I will ask you again, if that horse of Henry's was not jumping and jerking him, and doing that before and at the time that he fired the first shot?

A. Well——

Q. From the way the smoke went did that first shot strike Wilson?

A. I don't know whether it struck him or not, but he fell down.

Q. Did it have the appearance of striking him?

118 A. The smoke didn't.

Q. It went into the ground between the two, and they were standing nearer than across this house together, and you say now that Floyd went down, and then he arose and fired the third shot. Floyd fired the first shot, and Henry the second, and then Floyd raised and fired the third shot; is that right?

A. Yes, sir; that is the way I saw it.

Q. Standing facing each other, and then Henry fired the fourth shot, and Floyd fired again; that is the way you put it?

A Yes, sir; that is the way I saw it.

Q. Then when Floyd fell at the fourth shot the next you saw he was rolling over, and rolling towards where Henry was and firing and Henry coming towards him?

A. Yes, sir; looked like he was stepping up towards him.

Q. One standing up and walking towards the man he was fighting with and firing, and the other rolling over and going towards him, and firing as he rolled over; is that right?

A. Yes, sir.

Q. After Floyd fell the second time, when Henry had fired his second shot, do you know who fired the next shot, or can you tell?

A. I think Wilson fired the next shot.

Q. Then they were alternating. That one fired, and then the other about as fast as they could fire until they stopped?

A. Yes, sir; they exchanged a few shots and then stopped.

Q. At this time they had gotten closely together?

A. Yes, sir; some closer than when they started in.

Q. One man walking and the other rolling. After they stopped awhile you saw Floyd turn over again and fire another shot, and in a
119 breath the defendant, Henry Starr, fired his last shot; isn't that what you state?

A. I didn't understand myself that way.

Q. Do you state it differently now? Did you not state that after they shot awhile that they stopped shooting?

A. Yes, sir; there was some sort of a pause.

Q. Who commenced the shooting then after that?

A. Wilson as near as I can say.

Q. Wilson commenced it again?

A. Yes, sir.

Q. I will ask you if you did not say that there was about a breath between the two last shots, if you did not state that? What do you say to that now? You don't deny that do you, that the last two shots were about a breath apart?

A. Of course, there was none of them very far apart.

Q. I want to get at thise two last shots particularly. I understo'd you to tell the district attorney that when Mr. Wilson fired the next to the last shot that Mr. Starr stepped up and fired his immediately afterwards, and about a breath apart?

A. He run up, he had just about a step to go; he sort of drawed his gun, at the time it looked like he was going to hit him, and at the time that he got up it went down and went off.

Q. They had gotten so close together when the last shot was fired, when the last shots were fired, that they didn't have but a step to go?

A. I suppose it was about four or five feet, or six, a very short distance.

Q. That is how near they had gotten together. Wilson rolling towards him on the ground firing. You didn't know Wilson did you?

A. No, sir.

Q. Now, you say they had gotten four or five, or six feet apart?
120 A. Yes, sir.

Q. Had but a step to make when he stepped up and made that last shot?

A. Yes, sir; not a great distance; I think it was more than one step, but of course it was all done in a breath, you know, and it may have been four or five or six feet.

Q. Floyd fired that next to the last shot, and then the defendant took one or two steps, whatever it was, and right at once, instantaneously, and fired, so the two shots were right close together?

A. Yes, sir.

Q. Who fired the most shots?

A. Well, I think they were about equal.

Q. You were where you could see it?

A. I saw a great deal of it.

Q. Now, then, after this last shot was fired what did Henry do—Henry Starr?

A. After Starr shot at Dickey that time——

Q. After the last shot was fired at Floyd Wilson where were you?

A. I was staill standing where I was at all the time.

Q. What became of Starr?

A. He turned and run towards my horse.

Q. Did you see him pick up a gun?

A. No, sir.

Q. If he had done that would you have seen it?

A. I would have thought I would.

Q. Did he do it?

A. I don't know whether he did or not. I didn't see him do it.

Q. Where was Dickey when Starr was running towards your horse?

A. He was going towards where they had been.

Q. Was he still on his horse?

A. Yes, sir.

Q. When Henry Starr turned and fired at Dickey what did he do?

121 A. He kept on going towards my horse.

Q. What did Dickey do?

A. He got off his horse he was on and shot at Wilson.

Q. How did he get off?

A. He got off; it looked like he was going to fall off—tumbled off, I would call it.

Q. He tumbled, did he?

A. Yes, sir; I think he tumbled.

Q. How did he fire?

A. I think he fired from under his horse's neck, it looked to me like. His horse was so that he hid him from me; he fell on the opposite side.

Q. He fell on the opposite side from where Henry was, did he not? If Henry was shooting back this way he fell over on that side of his horse, did he not?

A. He got off sort of behind his horse as long as I could see him.

Q. What did you say about his shooting under his horse's neck?

A. I said that I thought from the way that the horse was—this horse was sorter of standing between me and Dickey—and I thought from the way that things looked that Dickey was shooting under his horse's neck at Henry, but I would not be positive about it, because the horse was standing there in my way.

Q. What did Dickey do after that?
A. He got on the horse and went to Wilson.
Q. What horse?
A. The horse that he had. He got on the horse right away after the shooting; he got on, or started to get on, and just as he got this way the horse jerked the other way and went back towards my stable.
Q. He had hold of the horse when he fired the shot?
A. It looked to me like he had the horse when he fired the shot. The horse was standing there; I don't know that he had him secure,
122 but he had him it looked like.
Q. Did Dickey's horse throw him off?
A. I don't think he did.
Q. He just got off when Henry shot?
A. It just looked like to me that he jumped off quick.
Q. You did not hear Henry hollo as he rode off?
A. No, sir.
Q. You heard no yelling?
A. No, sir.
Q. Did you see him waive any pistol or anything of the kind?
A. No, sir.
Q. He fired at Dickey with his pistol, did he not?
A. I think he fired the last shot at Dickey with the pistol.
Q. I will ask you if his last shot at the deceased was not with a pistol?
A. I don't think it was; I saw him throw the gun down just about the time that he broke and run.
Q. Dickey went over to where Wilson was?
A. Yes, sir.
Q. You went there?
A. I went to him; I went to my barn first and got a little horse and rode over there.
Q. You say there were no powder burns on his clothing?
A. I did not see any.
Q. Do you know how many cartridges there were in Henry's gun? You found his gun there, didn't you?
A. It was lying there on the ground.
Q. How many cartridges did you find in it not exploded?
A. I never examined the gun myself at all.
Q. What was done with the gun?
A. I think Dickey picked up them guns.
Q. What became of the gun afterwards, do you know?
A. I think Dickey took it.
Q. Do you know whether the guns were examined?
A. I think they were examined right there at that time, but I
123 didn't pay any attention to the examination.
Q. You didn't look at it yourself?
A. No, sir.
Q. Who came there?
A. Emmett Miller went up there, and afterwards John Padget came there.
Q. Was Miller there?
A. Yes, sir.

Q. Where was Miller standing during the time that this shooting occurred?

A. He was standing right there close to my side. I don't remember exactly whether he was right at my side, but he was there somewhere. Padget was plowing in a field; he was a quarter of half a mile the other side of where the shooting was.

Q. He was where he could see it, was he not?

A. Yes, sir.

Q. Do you know whether there was a cartridge hung in Henry's gun or not?

A. I could not tell you about Henry's gun. I saw Dickey pick up the gun that had been Floyd's gun, and he said, "My God! here is the reason he didn't do any better shooting than he did," and he showed me how it was, and I looked and could see that it was fastened at both end' of the cartridges.

Q. What they all call hung?

A. Yes, sir.

Q. Did you see the pistol there?

A. There was a pistol, sort of setting this way, stuck down between his left arm and his side, the muzzle of it stuck down on the ground. The handle was right down in between his left arm this way like; he was laying on his back, and it was this way [indicating].

Q. Did he have hold of it?

A. No, sir; it was tolerabe close to his right hand.

Q. His right hand must have been laying over here then?

A. His right hand, I think, was right about the edge of his breast, if I remember right.

124 Q. He was laying on his back?

A. Yes, sir.

Q. The pistol between his left arm and his body and the muzzle on the ground?

A. Yes, sir.

Q. Right hand near the pistol?

A. Yes, sir; I think probably three or four inches from the handle of the pistol; I could not say it was right at the pistol, but right close to it.

Q. He wasn't wounded in the head?

A. No, sir; not that I saw.

Q. Either horse wounded?

A. No, sir; not that I saw.

Redirect examination by the DISTRICT ATTORNEY:

Q. You say you saw no powder burns; did you examine to see whether there were any powder burns or not?

A. I didn't examine for powder burns; I examined to see how many times he was shot through his clothes when he was laying there, and I helped put him in the wagon.

Q. How many times was he shot?

A. I pronounced him shot five times.

Q. Where were they?

A. Once right down through here, in the left leg, and one here, in the left leg, in front of this one here. I did not take his clothes off to exam-

ine his body, but it was right in through here. And another one right through here, and one right above the other in here, and one in here, is the way it was through his clothes.

Q. Did you see any shots in his side?

A. Yes, sir; these shots were right here.

Q. Did you see any shot on the other side?

A. No, sir; I did not look at his back at all only in handling him: I got all over blood putting him in the wagon and taking him down to the house.

Q. Were his clothes bloody?

A. The back of his clothes were bloody; the blood I got on me I got off the back of him getting him into the wagon.

Q. After the shooting began how did Henry Starr hold his gun, after he fired first? Did he keep it up in position all the time?

A. Yes, sir; it looked to me like he had it right up in front of him all the time.

Q. I will ask you another question. Did you give these gentlemen any information as to whether Starr was around there, or would be there, or say anything about it?

A. Yes, sir; they asked me where they would be most likely to find him, and I told them I didn't know; he was around over that country there all the time, and they said they would stay with me, and the next morning they had their horses saddled to go, and I went to the barn apparently, and they were in the house as I started out, and Mollie Black was there, and I was doing some chores, and they were sitting right in the house, and I came in and they got up to go, and Mollie went around on the porch, and I heard one of them say to her, "There is a silk dress in it to you if you will," but I don't know what they were talking about.

Q. Who were they talking to?

A. Mollie Black; she is Mrs. Padget now. I went up to where they were and one of them remarked, "I guess we will stay here with you to-day, Dodge; I think we will be as apt to see Henry Starr here as anywhere else," and I said all right; that they would probably see him there as soon as anywhere else, and they went right down to the stable and unsaddled their horses.

Q. I understood you to say that when Henry ran off, the last thing you saw him do before he started was to throw down his gun?

A. Yes, sir; the last thing I saw him do was to throw down the gun, apparently drop it on the ground.

Q. As to whether that was the gun he had been shooting with or not you don't know, but think it was?

A. I sort of think it was the same gun he was shooting with; of course I am not real positive, but I think it was.

Q. You say he never picked up the gun to look at it?

A. No, sir.

Q. You speak about this man's having spurs on; do you remember of his having spurs on, or do you judge that from that fact that he was simply kicking his horse?

A. No, I saw Dickey with his spurs on; I saw him spur the horse and try to make him go.

Q. You stated in your cross-examination that the reason you thought so was because you saw him kick the horse?

A. I saw him spur the horse and he could not make him go, and I got that barb wire.

Recross-examination by Mr. W. H. H. CLAYTON:

Q. Did you know either of these men, or were they strangers to you?

A. They were strangers to me. I think I saw Dickey once between Nowata and Lenapah.

Q. Did you ever see Floyd Wilson before?

A. No, sir; not that I know of.

Q. You never saw him around in the neighborhood?

A. No, sir.

Q. Was he an entire stranger to you?

A. Yes, sir.

Q. You put one wound down here right in front on the ankle,
127 or near the ankle on the left side, on the left leh?

A. I think it was a little up to the left on the front of the left leg, right in about here somewhere, and one in right about here.

Q. In the lthigh?

A. Yes, sir; it looked like from the clothes it had been from the front here. This one in front went in the breast. These two wounds came around here. They seemed to be kind of glancing ones.

Q. Do you know whether all the balls had gone through or not?

A. No, sir; I don't know whether any of them had gone through only from the looks of the clothes.

Q. Do you know whether there was any here behind?

A. There was blood all the way down his clothes. I could not tell anything about whether they came through as far as that is concerned.

Redirect examination by the DISTRICT ATTORNEY:

Q. You say you didn't take his clothes off and examine him?

A. No, sir; I didn't.

Witness excused.

Here court adjourned until Wednesday morning, October 18, 1893.

128 WEDNESDAY MORNING, *October 18th*, 1893. (9:00 o'clock.)

JOHN T. PADGET, having been duly sworn upon behalf of the Government, was examined by the district attorney, Hon. James F. Read, and testified as follows, to wit:

Question. What is your name?

Answer. John T. Padget.

Q. Where do you reside?

A. I liv' in the Nation close to Nowata.

Q. How far from Nowata?

A. 7 miles.

Q. You are the husband of Mollie Padget, are you?

A. Yes, sir.

Q. Where did you live during last August and September?

A. I lived at the same place.

Q. At whose place did you life?

A. I lived on Arthur Dodge's place.
Q. How long have you lived in the Nation?
A. I have lived there pretty near three years.
Q. Are you a citizen of that country?
A. No, sir.
Q. Do you know Henry Starr?
A. Yes, sir.
Q. How long have you known him?
A. About 2 years and a half.
Q. How far did you live from him?
A. I lived about 2 miles, I guess, from where his home is.
Q. Had you seen much of him during that time; did you know him pretty well?
A. I was pretty well acquainted with him.
Q. Do you remember when Wilson was shot up there by Starr?
A. Yes, sir; I do.
Q. Where were you at that time?
129 A. I was about a quarter from where the shooting took place, or such a matter.
Q. What were you doing?
A. Plowing.
Q. What direction were you in from the shooting?
A. I was west.
Q. You were west of where they stood at the time they were shooting?
A. Yes, sir.
Q. Did you see the shooting?
A. Yes, sir; I saw it.
Q. Now tell just what you saw?
A. Well, sir; the first thing I noticed I saw a man riding across the prairie; the next thing I noticed——
Q. How is that? The first thing you saw was a man riding across the prairie; from what direction?
A. Coming from the east?
Q. Going towards whose house?
A. I don't think he was going particularly towards anybody's house; just going right across the prairie.
Q. From the east?
A. Yes, sir.
Q. How far was he from you when you first saw him?
A. Well, I guess half a mile or such a matter when I first noticed him.
Q. Well, go on now. Who was that?
A. It was supposed to be Starr.
Q. Didn't you know Starr?
A. Yes, sir; I knew him, but I don't know whether I would know him that distance or not.
Q. You had seen him riding around there frequently had you not?
A. Yes, sir; I had saw him.
Q. Associated with him two years?
A. Yes, sir; he came to my house the same as any of the neighbor boys.
Q. You say "supposed to be Starr?"
A. Yes, sir.

130 Q. Well, now then, go on.

A. The next thing I noticed was a man riding out from Arthur Dodge's on horseback in a dead run, and making out in about 100 yards of one another, as near as I can tell, from where I was, and they both came to a stop, dismounted, and stood there, Idon't know how long; quite a little bit.

Q. What were they doing there?

A. I don't know what they were doing; I could not hear what they were saying; they were talking, I suppose; I don't know what else.

Q. Go on, now.

A. And then I saw one of them start to lead off from the other, and then the other started to follow.

Q. Which one started to lead off?

A. The one I saw crossing the prairie.

Q. The one you supposed to be Starr?

A. Yes, sir.

Q. How far were you from him at that time?

A. At that time I must have been half a mile anyway.

Q. You were half a mile from him when he started to lead off?

A. Yes, sir; I guess a quarter or half a mile, or such a matter; I can't tell just positively the distance.

The COURT. All you are expected to do is to give your best judgment.

The DISTRICT ATTORNEY. Go on.

A. Then the other fellow started to follow him a little ways, and the fellow that I saw come out of Dodge's got on his horse and rode close down on him, an' he dismounted and dropped off of his horse, as near as I can tell, and he knelt down, hesitated a moment, or a very short time.

Q. You say as near as you can tell he knelt down?

A. Yes, sir.

Q. Are you certain about that?

A. I am certain that he knelt down; yes, sir.

131 Q. Why do you say that as near as you can tell he knelt down for?

A. He wasn't standing up.

Q. That is what you mean. Do you know whether he was stooping over or kneeling down?

A. He was either stooping over or kneeling down.

Q. What occurred then?

A. He fired then at the other man.

Q. How close together were they at that time?

A. I judge they must have been 20 or 30 feet apart; that would be my best judgment.

Q. Which way was Wilson facing?

A. He was facing north.

Q. Which way was Starr facing?

A. Starr was facing south.

Q. Where were you in that field?

A. I was west of them.

Q. What field were you in there?

A. I was in no field particularly; I was just breaking out some prairie.

Q. What direction were you from Dodge's house?

A. I was west.

Q. You were west of Dodge's house?

A. I was due west—well, nearly due west; yes, sir.

Q. How far were you from your house?

A. About a quarter.

Q. What direction is it from Dodge's house to where this shooting took place?

A. Southwest.

Mr. CRAVENS (of counsel for the defense). The place of the shooting is southwest from Dodge's house; is that what you state?

The WITNESS. Yes, sir.

The DISTRICT ATTORNEY. Southwest from Dodge's?

A. Yes, sir.

Q. As Wilson came out he was traveling southwest, as you saw him?

A. Yes, sir.

Q. This other man had come from the east, had he?

A. Yes, sir.

Q. You say Wilson stooped or knelt down and fired?

A. He did.

132 Q. What then?

A. There was a little hesitation, and then the other man fired.

Q. How much of a hesitation?

A. Few seconds; I could not tell just how long, but then there was enough that I could notice it plain enough.

Q. Enough that you could notice there were two shots?

A. Yes, si'.

Q. I will ask you if these shots were not close together?

Mr. CLAYTON (of counsel for defense). Ask him how close together they were.

The DISTRICT ATTORNEY. How close together were they; how much of a pause between them?

A. It would be a hard question to answer, just how much. Just a little hesitation; I could not tell how long; enough that I could notice it.

Q. Enough that you could notice one shot was fired by one man and another by another?

A. Yes, sir.

Q. What was done then?

A. There was another pause for a few seconds, and then the firing commenced on both sides.

Q. What occurred then; did either one of them fall?

A. This man supposed to be Wilson, he was kneeling down, and as the firing commenced he kind of raised and dropped and made an effort to raise up, or something that way; I could not tell from where I was just how that was.

Q. Didn't you see him fall?

A. I didn't see him fall. He raised or tried to, or something to that effect.

Q. Now, Mr. Padget, you made a statement to me about this, did you not?

A. Yes, sir.

Q. I want to ask you, in order to refresh your memory, if this was not your statement: When you speak of them stopping there and
133 parleying quite a little bit, you didn't know how long, maybe two or three minutes or five minutes, and then one of them started to lead his horse off, sort of, and Wilson started to lead his and followed him, and Starr lead him a little bit, and Wilson jumped on his horse and rides on down to Starr, right close to him, about 10 or 15 steps—I judge about that far—and Wilson just dismounted from his horse and dropped down on his knees and arms and shot at Henry Starr; and after a little hesitation Henry shot, and Wilson raised and shot again, and Henry shot, and Wilson fell, and from that the shooting between them I could not tell anything about it?

A. No, sir; I did not say that he fell. I do not remember of making that statement.

Q. Haven't you made that statement twice on that subject?

A. I have made a statement, but I don't remember of saying about Wilson falling. I don't remember of saying that.

Q. Then you did not see Wilson fall?

A. I didn't see Wilson fall.

Q. He didn't fall, did he?

A. As near as I can tell he knelt down when he first fired. As the shooting was going on he was flouncing around; I could not tell how he was, in what position he was in really, but he was flouncing around, raising up and dropping down; something to that effect.

Q. He was raising up, shooting, and dropping down, was he not?

A. I could not say whether he got straight up or not, but I could see him move.

Q. You say now that you didn't say that he fell?

A. I could not say that he fell. I don't remember of making that statement.

Q. When was it that he began to flounce around?

A. When the shooting took place between the two parties.

134 Q. Was that after the first shot fired?

A. That was after the first shot was fired by Starr.

Mr. CLAYTON (of counsel for defendant). You claim that the only difference between the statement he made before and the statement now is about falling, is it?

The DISTRICT ATTORNEY. That is the only difference; yes, sir. That is the statement that he made before. (To the witness:) What else occurred then? Who fired the last shot?

A. I suppose it was Starr.

Q. Can't you state? You saw who fired it, didn't you?

A. Yes, sir.

Q. Well, who was it?

A. It was him.

Q. It was Starr?

A. Yes, sir.

Q. How close was he to Wilson when he fired it?

A. I could not say positively how close he was. During the firing he advanced on the other man; they seemed to be advancing towards one another, and when the last shot was fired, as near as I can tell, he was tolerably close to him.

Q. Do you mean Wilson was advancing towards Starr?
A. They were advancing towards one another, as near as I can tell.
Q. I thought you said Wilson was wriggling around; was he rolling over?
A. He was jumping around, sorter raising up.
Q. You say that Starr was advancing on Wilson?
A. Yes, sir.
Q. How was he advancing?
A. As he shot, as near as I can tell, he would keep stepping up.
Q. As he shot?
A. Yes, sir.
Q. How close was he to him when he shot him the last time?
A. That would be hard for me to say just how close he was.
135 He was some closer than he was at the start.
Q. Why, of course he was. Can you give any estimate of it, of how close he was?
A. I could not.
You could not, but he was close to him?
A. Yes, sir, he was close to him.
Q. What did he shoot with the last time?
A. I am not positive; I think it was a six-shooter.
Q. What makes you think that.
A. As near as I could see from where I was I kind of thought it was.
Q. Were you near enough to see it was a six-shooter? If you were, why wasn't you near enough to see how close it was?
A. That is harder to do. That is a hard matter to do, to say how close he was.
Q. Could you tell it was a six-shooter or a gun?
A. That is just my opinion. I could not swear positive it was.
Q. Where did you get that opinion?
A. Well, what makes me of that opinion is that I saw afterwards.
Q. What did you see afterwards?
A. After I got out there.
Q. What did you see?
A. I saw the gun that Starr used, the Winchester.
Q. Where was that?
A. It was laying there, close.
Q. Close to Wilson?
A. Yes, sir; laying there.
Q. Might he not have shot that last shot out of the gun, and throw it down and run off?
A. I say he could have done it. I could not swear positive on that.
Q. As a matter of fact you could not say whether it was a pistol or a gun?
A. I could not say positively.
Q. Did you see Dickey?
A. I saw him riding.
136 Q. Did you see Starr shoot at Dickey?
A. I did.
Q. Was that before or after he had fired the last shot at Wilson?
A. That was afterwards?

Q. What became of Starr then?
A. He got on his horse and rode off.
Q. What direction did he go?
A. He went west, a little southwest.
Q. Whose horse did he get on?
A. Arthur Dodge's.
Q. When did you see Star' the next time?
A. Two or three weeks from then, I think.
Q. Where was he then?
A. He came to my place.
Q. Where was he at your place?
A. I could not tell you.
Q. When did you first see him there?
A. I think it was one Saturday evening.
Q. What time in the afternooon?
A. About four o'clock, I think; four or five.
Q. How long had be been there then?
A. I think he had just come.
Q. Was he armed?
A. Yes, sir.
Q. What did he have? What kind of arms did he carry?
A. He had a Winchester.
Q. And a pistol?
A. Yes, sir.
Q. How long did he stay there then?
A. He staid all night and the next day, I think.
Q. Where did he stay?
A. He staid in the house.
Q. What part of the house?
A. I haven't got but two rooms in the house, and that is a kitchen and this room we use.
Q. Have you got a loft in your house?
A. Yes, sir; upstairs.
137 Q. Was he in there?
A. I think he was.
Q. In the day?
A. The next day.
Q. What time did he leave there the next day?
A. In the evening.
Q. That was about three weeks, you say, after the killing?
A. Yes, sir.
Q. Did Henry Starr at that time say anything about the marshals being after him?
A. He did not.
Q. Did he ever state anything to you about the marshals being after him?
A. Before the shooting I was told by him that he supposed they were after him. He said so to me one time.
Q. How long before the shooting?
A. I don't know just how long it was; I don't remember
Q. A few days or a week, or how long?

A. A few days or a week, or such a matter.
Q. He supposed the marsha's were after him?
A. Yes, sir; he supposed so.
Q. Did he say what for?
A. He didn't say.
Q. You didn't ask him?
A. No, sir; I didn't ask him.
Q. Where was he when he told you that?
A. I could not say positively where he was, whether he was at my place or down over the country.
Q. Was he armed?
A. Yes, sir.
Q. What arms did he usually carry?
A. He carried a gun and a pistol.
Q. A Winchester gun?
A. Yes, sir.

Cross-examination by Mr. W. H. H. CLAYTON:

138 Q. You are the man who was plowing in the field, were you not?
A. Yes, sir.
Q. The first man you saw, I believe you state, was Henry Starr—that is, the man you now know to be Henry Starr?
A. Yes, sir.
Q. Going across the prairie?
A. Yes, sir.
Q. Going in an easterly direction?
A. Yes, sir.
Q. After awhile you saw a man riding down from Arthur Dodge's; did you know the man?
A. I didn't know him at the time; no, sir.
Q. Were you acquainted with Floyd Wilson?
A. He was at my house on Monday morning before the shooting took place on Tuesday.
Q. Was that the first time you had ever seen him?
A. Yes, sir.
Q. He was a stranger in that country?
A. Yes, sir.
Q. Did you know Dickey?
A. He was with Wilson.
Q. Had you ever seen him before?
A. He was with Wilson at my house the same time.
Q. Had you ever seen him before that time?
A. No, sir.
Q. Both men were strangers in that country?
A. Yes, sir.
Q. When you saw Wilson then riding down on Henry Starr did you know it was the man you had seen the day before, or could you tell?
A. I thought it was; I could not tell positive; I just supposed it was.
Q. How did he ride; rapidly?
A. He rode rapidly.
Q. I believe you stated to Mr. Read that he rode in a dead run?

A. Yes, sir.
Q. He rode down how close to Starr before he stopped?
A. I should judge about 75 or 100 yards.
Q. Then both men there got off their horses?
A. Yes, sir.
Q. While he was riding down on to Henry Starr what did Starr do?
139 A. He was riding along in a slow walk.
Q. Did he try to run away from Wilson?
A. He did not.
Q. Did he spur up his horse and ride fast, rapidly, at any time?
A. No, sir.
Q. He didn't seem to be trying to get away from him at all?
A. No, sir.
Q. Now, did the two men get off their horses at the sa'e time, or one before the other?
A. About the same time, as near as I can tell it.
Q. If I understand you, Wilson rode down on a dead run—did he suddenly check his horse?
A. Yes, sir; checked up his horse.
Q. They both got off?
A. Yes, sir.
Q. They stood there a few seconds, you say?
A. Yes, sir.
Q. And then Wilson got on his horse, and rode up to within 25 or 30 feet of Starr?
A. They stood there for a few minutes, and then Starr kind of took hold of his bridle rein and lead off, and the other man started to lead with him, and then got on his horse, and rode down on him.
Q. Could you see their guns?
A. Yes, sir; I could see their guns.
Q. Neither one of them had pointed their guns at the other at this time, had they?
A. I think not.
Q. When Wilson got on his horse and rode within 20 or 30 feet of Starr, did he ride rapidly.
A. He rode in a lope.
Q. When Wilson rode down on to Starr he went within 25 or 30 feet of him—you measured the distance with your eye?
A. Yes, sir.
Q. He then jumped off his horse?
A. Yes, sir.
Q. Did you notice, or could you tell, whether Starr was holding his horse or not.
A. Why, I think he was.
140 Q. They were standing there together were they, he and his horse?
A. Yes, sir.
Q. Both had guns?
A. Yes, sir; both had guns.
Q. You say Mr. Wilson dropped down on his knees?

A. Yes, sir.

Q. I will ask you if at that time Henry Starr was not standing there with his gun, the muzzle of it towards the ground?

A. I think he was, as near as I could tell.

Q. At the time that Wilson dropped on his knee and fired, I will ask you if he did not have his gun in that position and hold it that way all the time?

A. Yes, sir.

Q. Now then, he was holding his gun in that position when Wilson fired at him, was he?

A. Yes, sir.

Q. You say that you think that Wilson dropped upon his knees?

A. Yes, sir; I think so.

Q. I will ask you when you found the body you did not find that he was shot in his left leg twice?

A. He was.

Q. In front, did n't you?

A. Yes, sir.

Q. Could you described about how he was upon his knees, whether he fell upon one knee, or both?

A. I could not say positive whether on one knee or both. I know he squatted down, though, when he fell; I was n't close enough to tell whether he was on one knee or both.

Q. That is the first shot that was fired?

A. Yes, sir.

Q. Now, then, I want to understand you fully; you say that up to that time that Mr. Henry Starr had made no effort to shoot him, had not raised his gun or anything of the kind?

A. No, sir; he had not.

Q. Henry Starr was a boy, was he not?

A. Yes, sir.

Q. Do you know how old he was at that time?

141 A. He was 18 past, or somewhere along there.

Q. After Wilson fired upon Starr you saw that Starr then fired upon Wilson?

A. Yes, sir.

Q. Could you tell who fired the most shots?

A. I could not tell by the shooting, but afterwards I could tell by the gun; that is the only way I had to tell, for at one time they were both shooting together and you could not tell much about it.

Q. Shooting rapidly?

A. Yes, sir; shooting rapidly.

Q. I will go back to that again after a while. Do you know who fired the next to the last shot, or could you tell?

A. As near as I could tell I think Wilson fired it.

Q. The last shot was fired by the defendant, which ended the battle?

A. Yes, sir.

Q. I will ask you if those two last shots were not fired close together?

A. They were tolerable close together.

Q. One followed the other?

A. Yes, sir.

Q. You think, you say, that Henry fired his last shot with his pistol?
A. Yes, sir; I think so.
Q. You found his gun there, didn't you, afterwards?
A. Yes, sir.
Q. What condition was his gun in, or do you know?
A. When I saw it Dickey had got hold of it. He was the first man there, and Arthur Dodge was there before I got there, and as near as I can remember they had handled the gun before I got there.
Q. Were there any loads in it?
A. I could not say positive whether there were or not.
Q. You don't remember about that?
A. No, sir.
Q. His gun was there?
A. Yes, sir.
Q. Both guns were there?
A. Yes, sir; both were there.

142 Q. After the last shot was fired, I believe you say that Starr started for his horse, or did you mention that? What did Starr do immediately after the last shot was fired?

A. He started to run to get a horse.
Q. Where was Dickey at that time?
A. He was coming out on horseback.
Q. Did you notice whether he had a gun or not?
A. Yes, sir; he had a gun.
Q. Starr, you say, shot at Dickey; where was he when he fired at Dickey?
A. He was about 50 yards from where the shooting took place.
Q. Going for the horse?
A. Yes, sir.
Q. Did he fire with a pistol or a gun?
A. I think a pistol.
Q. His gun was behind?
A. Yes, sir.
Q. What did Dickey do when he fired at him?
A. He fell off his horse.
Q. Dickey was on his horse, was he?
A. Yes, sir; at that time.
Q. And that was after the last shot had been fired at Wilson and after Starr had gotten about 50 yards away from him?
A. Yes, sir.
Q. That was the shot that he fired at Dickey and Dickey was still upon his horse?
A. Yes, sir.
Q. Dickey was not off his horse standing there when that last shot was fired, but he was on him?
A. He was on his horse.
Q. Was Starr running in an opposite direction from Dickey when he run to this horse?
A. He was.
Q. Turned and fired?
A. Yes, sir.

Q. When he turned and fired you say that Dickey fell from his horse; how did he fall?

A. He just tumbled off.

Q. Then what did he do?

A. He kind of got in front of his horse and shot from in front of his horse at Starr.

143 Q. What was Starr doing at that time?

A. Star had caught his horse at that time, or was close to him, and got on his horse and rode on.

Q. Was he still going for his horse or had he got to it?

A. I don't think he was quite to it—still going after it.

Q. In what position was Starr with reference to Dickey, facing him or his back to him?

A. He run kind of sideways from Dickey and Dickey fired at him, and Starr didn't return that fire; he got on his horse.

Q. He got on his horse and rode off?

A. Yes, sir.

Q. You say that Dickey got off his horse and then got on the other side and fired?

A. He fell off his horse.

Q. Did he fire under the horse's neck?

A. He fired under the horse's neck, it seemed like—right under the horse's neck.

Q. Fell off the horse and fired under the horse's neck at Starr?

A. Yes, sir; he did.

Q. Could you see who were at Dodge's house from where you were?

A. I could.

Q. You could not tell who was there?

A. No, sir; I could not tell.

Q. Did you see anybody around the house?

A. I saw some fellows around the house; I could not tell who they were.

Q. You say that Wilson, during the time that he was shooting, was floundering around and the two were going nearer to each other?

A. Yes, sir.

Q. Wilson was going towards Starr and Starr towards Wilson?

A. Yes, sir; as near as I could tell.

Q. And both firing?

A. Yes, sir.

144 Redirect examination by the DISTRICT ATTORNEY:

Q. You stated a moment ago in answer to a question by Mr. Clayton that when Starr fired at Dicky, Dickey fell off his horse, and that Dickey then got in front of his horse and shot at Starr?

A. He did.

Q. Then he did not shoot under the horse's neck if he was in front of Starr.

A. He got in front of the horse and shot as near as I can tell, shot right kind of under the horse's neck.

Q. He was in front of the horse though?

A. He was in front of the horse when he fired.

Q. What became of Dickey's horse?
A. It got away from him and ran back.
Witness excused.

145 Mrs. MARY PADGET, having been duly sworn upon behalf of the Government, was examined by the district attorney, Hon. James F. Read, and testified as follows, to wit:

Question. What is your name?
Answer. Mary Padget.
Q. Where do you live?
A. Seven miles northwest of Nowata.
Q. You are the wife of John Padget, are you?
A. Yes, sir.
Q. How long have you lived up there in that country?
A. A year last June.
Q. At whose house did you live prior to your marriage?
A. Arthur Dodge's.
Q. What was your name before you were married?
A. Mary Black.
Q. Do you know Henry Starr?
A. Yes, sir.
Q. How long have you known him?
A. About a year. I got acquainted with him about June when I first came into the Territory.
Q. Where did you get acquainted with him?
A. Bill Kinney's.
Q. Were you well acquainted with him; did you see him often?
A. Why, I saw him quite often.
Q. Did he visit at Dodge's house?
A. Yes, sir; he came there several times.
Q. What did he come there for?
A. I could not tell you what he came for. I suppose because he wanted to.
Q. Did he come to see you?
A. No, sir; I don't suppose he did.
Q. Was he visiting anybody there at Arthur Dodge's house; was he meeting anyone there?
A. There was a young lady once in a while came there.
Q. What was her name?
A. Mary Zane.
146 Q. He was there to see her, was he?
A. They met there several times; I suppose he came to see her.
Q. Is that the lady that he afterwards married?
A. No, sir.
Q. Do you know whether he is married or not?
A. I could not say.
Q. Where were you at the time that Floyd Wilson was killed?
A. Arthur Dodge's house.
Q. And where were you right at the time of the killing?
A. I was out on the porch.
Q. What were you doing out on the porch?

A. I went out to throw some water out.
Q. When did you first know Floyd Wilson?
A. I saw him there at Arthur Dodge's the first I ever saw him.
Q. When was it?
A. It was about the 12th of December that he came there; it was the 13th he was killed.
Q. Do you know what day of the week it was?
A. It was on Tuesday, to the best of my recollection.
Mr. CRAVENS (of counsel for defense). Tuesday that he was killed or that he came?
A. Tuesday that he was killed.
The DISTRICT ATTORNEY. He came there then Monday; when was the first you saw him?
A. Monday morning is the first I saw him.
Q. Who was with him at that time?
A. Mr. Dickey.
Q. How long did they stay there?
A. They staid there, and Teusday morning they went out. I saw them go out to where Henry Starr was.
Q. Tell what you saw there about the shooting.
A. I saw Wilson—who they call Wilson—ride out, and I looked out and I saw the gentleman who they call Henry Starr, riding across.
147 Dickey was trying to get his horse along, I supposed, and Arthur Dodge was behind it, whipping it with a wire—he said it was a wire; I do not know what it was, only what he said.
Q. Now, tell about what you saw of Starr and Wilson.
A. I saw Wilson shoot. There was quite a little pause, and I saw the other party shoot, and then there was constant smoke; I could not tell who did the shooting.
Q. How did Wilson shoot?
A. He shot towards the other party.
Q. How close were they together when he shot?
A. I could not say how close; they said about 17 feet of him; I don't know anything about it myself; I never went out to see.
Q. Who told you it was 17 feet?
A. I have heard the neighbors all say that went out and seen it. Mr. Padget was there when they taken Floyd to the train.
Q. How far did it look to you to be?
A. As far as across this house.
Q. Were they on the ground when they shot?
A. I could not say positively whether Wilson was or not; they were standing in such a shape; the other party I seen dismount.
Q. Saw who dismount?
A. Who they call Starr.
Q. Did you see Wilson dismount?
A. I could not say whether he was on the ground or not.
Q. Did you see them stop more than once?
A. It looked like they went on aways; the other party did.
Q. Which other party; the one they call Starr?
A. Yes, sir; who they call Starr.
Q. How far were you from them?

A. I don't know the distance myself; they call it about a quarter of a mile.

148 Q. Did you hear them talking any?

A. I understood Wilson to say, "Hold up; I have a warrant for you," and I thought I heard the other party say, "You hold up."

Q. How long was that before the shooting began?

A. It was quite a little bit.

Q. About how long?

A. Well, I could not say that.

Q. Well, the shooting commenced soon after that, did it not?

A. Quite a little bit; I suppose five or ten minutes.

Q. Five or ten minutes?

A. It seemed to me like it was that long.

Q. From the time that Wilson said, "Hold up; I have a warrant for you;" and the other fellow said "You hold up;" then it was five or ten minutes after that before the shooting began?

A. Yes, sir; that is what I should judge it was.

Q. How much shooting did you see? Did you see the last shots?

A. I heard the two shots; I saw the smoke; I could not say how many more bullets there were fired.

Q. What did you do?

A. I run in the house and fixed some water on, for I supposed they would bring the corpse there.

Q. Did you know anybody had been killed there at that time?

A. I heard Arthur Dodge say that one of the party had been killed; I could not tell who it was; I supposed they would bring him to the house, and I went to put some water on. I didn't know whether he was killed or not, or whether he was wounded only.

Q. Did you see what became of Starr after that?

A. No, sir; I did not.

Q. Have you seen Starr since the shooting?

A. Yes, sir.

Q. Where was he?

A. To Morrison's to a dance.

149 Q. How long after the shooting was this?

A. About three weeks, I think.

Q. Did he have his gun with him?

A. I could not say; I did not see it if he did.

Q. Did you see him any more after that?

A. Yes, sir.

Q. When?

A. At our house.

Q. Where was that? At Padget's?

A. Yes, sir.

Q. What was he doing there?

A. He came there in the house.

Q. How long did he stay there?

A. I should judge an hour or so.

Q. Did you ever know of his being there at any other time at your house except that?

A. No, sir; he has never been there except then.

Q. He only staid there about an hour or so?
A. The best of my knowledge that is it.
Q. When were you married to Padget?
A. The 9th day of February.
Q. What did he come there for at that time?
A. I could not tell you his business.
Q. He didn't tell his business?
A. No, sir.
Q. Was he armed; did he have his gun?
A I didn't see his gun at all.
Q. Did he have on his overcoat?
A. No, sir; it was in April or May; I don't know which month it was that he was there.
Q. Did he ask for anything? Did he say what he was there for?
A. He asked me to cook his supper, and I told him it was just as Mr. Padget said.
Q. Did you cook supper for him?
A. No, sir.
150 Q. Did you see him after that?
A. No, sir; I never saw him any more.
Q. Why didn't you cook his supper?
A. Mr. Padget said it was best not to?
Q. Why best not to?
Mr. CLAYTON (of counsel for defendant). We object to that.
The WITNESS. Because they were hunting for him there, and he was afraid we would get into trouble——
Mr. CLAYTON (of counsel for defense). Wait a minute!
The COURT. I do not think that is hardly competent. She can give as a reason why she did not do it that her husband told her not to.
Mr. CLAYTON (of counsel for defendant). We object to that; we object to anything about their getting supper for him, whether they got supper for him or not, for the reason that it is irrelevant.
The COURT. Upon what ground is it irrelevant?
Mr. CLAYTON (of counsel for defendant). It tends to prove nothing.
The COURT. I think his actions and all that are competent to show whether or not he was scouting after this act.
Mr. CLAYTON (of counsel for defendant). The reasons that they did not get supper for him does not. It may be shown to prove that they thought so, but they could not say that they thought he was, if your honor please, and therefore they can not introduce circumstantial evidence to show what their thoughts were.
The COURT (to witness). You may state the fact whether you gave him supper, if you did.
A. No, sir; I did not.
151 Mr. CLAYTON (of counsel for defendant). We object to that, and save an exception.
The COURT. Yes, sir.
The DISTRICT ATTORNEY. Had you ever heard Henry Starr, either before or after this shooting, say anything about the marshals being after him?

A. Not those marshals. He was there one evening, and he said something; he guessed they were hunting for him, and I asked him what for, and he said he supposed for jumping his bond.

Q. What marshals do you refer to?

A. Cowden.

Q. Was that before or after the shooting?

A. I was telling him about Cowden being there hunting him.

Q. You were telling Henry about it?

A. Yes, sir.

Q. And he said he supposed they were hunting him for jumping his bond?

A. Yes, sir.

Q. How long before the shooting was that?

A. Three or four weeks before the shooting.

Cross-examination by Mr. W. H. H. CLAYTON:

Q. You are the wife of John Padget?

A. Yes, sir.

Q. You say that you told Henry that Cowden had been there?

A. Yes, sir.

Q. You knew Cowden, didn't you?

A. I had seen him once; he came in there one night.

Q. He was a deputy marshal?

A. Yes, sir.

Q. And he was the marshal, if Henry was expecting a marshal
152 after him, he was the one that was expecting?

A. I told him that the marshals were after him, and he said he didn't know what they were hunting him for unless it was for jumping his bond.

Q. You told him that Cowden had been there, and he said he supposed it was that they were there hunting him because he had jumped his bond; is that the way of it?

A. Yes, sir.

Q. That was some three or four weeks before the shooting?

A. I should judge it was that long.

Q. Had you ever seen, or did you know Floyd Wilson before the time that he came there and was killed?

A. No, sir; I didn't know there was such a man in America.

Q. You didn't ever know him?

A. No, sir.

Q. Did you know Dickey prior to that time?

A. No, sir.

Q. How long did you live in that house there?

A. Five months—four months and something.

Q. You were a widow at that time, were you?

A. Yes, sir.

Q. Henry Starr was not courting you, was he?

A. No, sir.

Q. You and Padget were married the next month?

A. In February.

Q. You and he must have been courting at that time? You wouldn't have a boy fooling around you, would you?

A. I wouldn't think I would. [Laughter.]

Q. Henry was nothing but a boy, was he?

A. I have too much respect for a boy and myself to court a boy, when he can do better. [Laughter.]

Q. That is right; I think you are entirely right on that. Henry is nothing but a boy?

A. If he has told me the truth about it he was 19 years old at the time.

Q. You were at the house when you saw this shooting?

A. Yes, sir.

153 Q. You don't know whether Wilson was on his horse or off of it when he did the shooting?

A. I could not say positive, because he was standing in such a position I could not say.

Q. Do you know whether Dickey or Wilson had the warrant?

A. I could not say which had the warrant, or whether they had any or not.

Q. You saw Wilson riding down onto Henry Starr, didn't you?

A. Yes, sir; this one who they called Henry Starr.

Q. They didn't do any talking, did they, until they got close together, did they?

A. No, sir; I don't know what distance they were.

Q. You were on the porch?

A. Yes, sir.

Q. You state they were close together; you don't know how far they were apart?

A. I could not say as to the di*at*'nce—how far—but the way it seemed to me Wilson was hollering at him.

Q. Was Wilson a stranger to you? I believe you have stated he was a stranger to you?

A. Yes, sir.

Q. Could you tell the difference in the voices of the two men?

A. I could not tell the difference.

Q. You heard somebody, simply, say something about a warrant, and you thought it was Wilson?

A. Yes; I judged it was by him, being there after Henry.

Q. That is the reason you judged it; you heard some one say something about a warrant?

The ASSISTANT DISTRICT ATTORNEY. She did not say that.

Mr. CLAYTON (of counsel for defendant). She has said it, and will say it again.

The WITNESS. I try to say the same thing twice.

154 Q. You heard somebody say something about the warrant, and you thought it was Wilson because you knew that it was Wilson—because you knew that Wilson was apprehending him?

A. I could not tell the voices; no, sir.

Q. It may have been Henry said something about the warrant; you could not tell? You didn't know the voices?

A. I could not understand the voices; they were so far off.

The ASSISTANT DISTRICT ATTORNEY. Her statement was that she heard some one say, "Hold up; I have a warrant for you."

Mr. CLAYTON (of counsel for defendant). I have not said she did not. (To the witness.) Am I correct about that, am I? What I state is correct, is it?

A. I should judge——

Q. You were off a quarter of a mile?

A. I know nothing about the distance of miles.

Q. They were away off on the prairie?

A. They were away off close to the tank; they say it is about a quarter of a mile from where we live.

Q. They say it is a quarter to the tank, and they were close to it?

A. Yes, sir.

Q. You could not say, then, whether Wilson got of' the horse or not, could you?

A. I could not say positive whether he got off, but I saw the other party dismount. They were beyond a little rise from me.

Q. I take it from what you say that you really don't know much about the shooting particularly. You say that if Wilson fired the first shot you don't know it, and even don't know if he was off his horse, and then they fired backwards and forwards?

A. Yes, sir; I saw him fire. The smoke went from him, and
155 the other smoke came towards him; that is all I know.

Q. You say the first smoke come from him and the next smoke towards him?

A. Yes, sir.

Q. That is the reason you know that he fired first?

A. Yes, sir.

Q. But you don't know whether he was off his horse or not?

A. I could not say.

Q. You don't know whether he got off his horse or not, do you?

A. I suppose he got off after he was killed.

Q. But you do not even know that he got off his horse; you must have been excited?

A. Well, if I wasn't I don't know who ought to have been.

Q. You were very much excited, were you not?

A. I was excited to see the shooting and the way this Dickey's horse was going.

Q. That excited you?

A. Yes, sir.

Q. That was before the shooting?

A. Yes, sir.

Q. How was Dickey's horse acting?

A. He was running backwards with him.

Q. It threw him once or twice, did it not?

A. No, sir; it never threw him at all; the horse fell with him once.

Q. You were watching Dickey?

A. I was just looking backward and forward.

Q. You were employed there by Dodge as housekeeper, were you?

A. Yes, sir; I was getting fifteen dollars a month.

Q. Was he a married man or a widower at that time?

A. He was a widower.

Q. You were a widow?

A. Yes, sir.

Q. Maybe it was Mr. Dodge you were watching?

A. Well, perhaps it was.

156 Q. You say that Dickey's horse threw him once, or fell with him once?

A. He fell with him more than once.

Q. Was that before the shooting or after?

A. It was while Wilson was going out there.

Q. Dodge was whipping Dickey's horse?

A. With a wire, he said afterwards. I saw him whipping; I didn't know what he was whipping him with.

Q. What became of Dickey?

A. He went on out there after Henry, riding off; he got out there just in time to see Wilson breath' his last breath.

Q. Did Dickey get out there before the shooting was over?

The DISTRICT ATTORNEY. Are you telling what you know yourself or what you heard afterwards? Did you see Dickey go out there?

A. I seen him state; I could not say that I saw him go out there. I did not see Dickey go out there, but I saw him start.

Mr. CLAYTON (of counsel for defendant). Of course I want to get ay what you know yourself, and not what anyone else said. Did you see Dickey riding down towards the fight?

A. He started that way.

Q. Did you see him when he got from his horse, fall off?

A. No, sir; I did not see that.

Q. Did you see Henry Starr when he got on his horse after the shooting?

A. No, sir; I did not.

Q. You went in the house to fix some water to wash the corpse?

A. Yes, sir; to wash the corpse after the shooting, after I seen no more smoke.

Q. You staid out there until you saw the shooting was over?

157 A. I heard Arthur say——

Q. Never mind that; Arthur has had his say. I am asking you if you remained out there until after the shooting was all over with?

A. Until I seen the smoke cease.

Q. You could see no more shooting?

A. No, sir.

Q. Did you see anybody shoot Dickey?

A. I did not.

Q. Did you see Dickey shoot at anybody?

A. I did not.

Q. Are you right sure that you saw it? You were on the porch?

A. Saw which?

Q. The shooting.

A. I saw this shooting between Floyd and Henry.

Q. How many shots did Henry fire?

A. I could not say. I saw Floyd shoot, and then I saw the other party, and then I saw smoke, and I could not see any more. Floyd shot fir t.

Q. You say he shot first?

A. Yes, sir; from the looks, the way the smoke went he did.
Q. And then after he shot a little while Henry shot?
A. Yes, sir.
Q. Then who shot the next time?
A. I could not say.
Q. You don't know anything about that?
A. No, sir; I do not know anything about it.
Witness excused.

158 EMMETT MILLER, having been duly sworn upon behalf of the Government, was examined by the district attorney, Hon. James F. Read, and testified as follows, to wit:

Question. What is your name?
Answer. Emmett Miller.
Q. Where do you live?
A. About 3 miles south of Lenapa is where I make my home.
Q. Where did you live during last August? August a year ago I mean.
A. August a year ago I was with a threshing machine.
Q. Where were you last December, at the time of this shooting?
A. Last December I was with Mr. Padget; working for Mr. Padget.
Q. Do you know Henry Starr?
A. Yes, sir.
Q. How long have you known him?
A. I have known Henry for the last six years, I guess; something like that; maybe longer than that.
Q. Have you lived near him?
A. Yes, sir.
Q. How near to him?
A. I used to work at Robert's, and Henry lived about 2 miles from where I was making my home, I guess.
Q. Were you friendly with him?
A. Yes, sir.
Q. You were boys there together, were you?
A. Yes, sir.
Q. Run together?
A. Yes, sir; we worked together a good deal. Henry used to work at the same place I did off and on.
Q. You say you were working for Padget the day that the shooting occurred. Where were you; at Padget's?

159 A. I was at Padget's—that is, the day that occurred; I had a kind of a felon on my hand, and was not working that day, and I went down to Arthur Dodge's at the time that happened.

Q. Who did you see down there at Dodge's?
A. I went down there at the house, and there was a lady there named Mrs. Black, and I asked her where Arthur was, and she says, "He is down to the barn;" and I just went out of the house and went down to the barn. As I went down to the barn I hadn't any more than got down to the barn until here come Mr. Wilson as hard as he could go, and he says to me, "Get that horse out." He says, "Get it out." I got the horse out, and I tied the horse; I tied the horse there to the barn.

Q. What else?

A. Arthur Dodge saddled the horse.

Q. Go on. Was that the horse Wilson rode?

A. No, sir; the horse Wilson rode was Arthur Dodge's horse. Arthur had his horse already saddled in the barn.

Q. Then Wilson got on Dodge's horse and rode off?

A. Yes, sir.

Q. What was done with the other horse; the horse you took out?

A. I think that one they call Dickey took it.

Q. Did the horse do anything, or walk right off? Did Dickey ride off on him?

A. The horse cut up; the horse would not go off.

Q. He bucked around there a considerable, did he?

A. He did not buck around—what I call buck. He just run backwards; he would not go.

Q. Did he fall down with Dickey?

A. The horse fell down once—that is, he kind of run back; kind of caught his feet and kind of fell back lick; he didn't exactly fall backwards, either, but he kind of caught his foot and fell backwards there.

Q. The horse would not go?

A. No, sir.

160 Q. What was Floyd Wilson doing in the meantime?

A. Floyd Wilson he got on this here Arthur Dodge's horse, and he run out there on the prairie as hard as he could go.

Q. Did you see anybody else on the prairie?

A. Yes, sir; I seen this fellow coming out south of Arther Dodge's field, going west.

Q. Coming from the east?

A. Yes, sir; coming from the east, going west.

Q. Who was that?

A. Supposed to be Henry Starr.

Q. Well, didn't you know him?

A. I thought I did.

Q. You recognized him then as Henry Starr?

A. I thought it to be Henry Starr.

Q. What occurred then?

A. Henry at that time had got quite a little ways; I should judge it to be a quarter of a mile; kind of southeast there from Arthur's house; may be not that far; may be farther; I don't know just how far it was. Any way, these follows came to a halt out there, and they both dismounted, and pretty soon this first man, the one that was going this way——

Q. We will call him Starr.

A. Starr; he was trying to lead his horse off, and this here Wilson, he jumps on his horse and he runs up close and dismounts—Wilson did. And then pretty soon there was a shot fired from Wilson's gun; Wilson fired the first shot, and then Starr fired; there was two shots there, and then there was a pause there, and then pretty soon the shooting took place again, and then there was several shots fired.

Q. Was Wilson standing up while the shooting was going on?

A. I don't think he was standing up. It seems to me that when Wilson fired the first shot he was kind of down like, if I remember right.

161 Q. Did you see him fall at any time during the shooting?

A. No, sir; I did not see him fall at all.

Q. You never did see him fall?

A. No, sir; I don't remember of seeing him fall. In fact, I was kind of excited anyway.

Q. Was Starr standing still while the shooting was going on?

A. Starr, he was standing still the first time; yes, sir; he was standing still.

Q. Well, after the first time what did he do?

A. He kind of go towards this other fellow.

Q. Going towards Wilson?

A. Yes, sir; if I remember right, going towards him all the time.

Q. Shooting?

A. Yes, sir; that is, he appeared to be moving.

Q. Moving toward him, was he not?

A. Yes, sir.

Q. Did you see who fired the last shot?

A. Starr fired the last shot.

Q. How close was he to Wilson then?

A. He was close.

Q. How close?

A. Right close. I don't know just how close he was, but he was right close.

Q. Right over him, was he not?

A. I thought so.

Q. What did he fire the last shot with, his gun?

A. It was a six-shooter, I guess. I don't know whether it was a gun or a six-shooter.

Q. What made you say six-shooter?

A. I don't know; I thought it was; I don't know.

Q. Did anybody ever tell you it was a six-shooter?

A. No, sir; never did that I remember of.

Q. You don't know, then, whether it was a gun or a six-shooter that he shot with?

A. No, sir.

162 Q. Did you hear them say anything before the shooting began?

A. No, sir; I could not tell a word that they said.

Q. Could you hear they were talking at all?

A. There was once or twice that I heard something, but I could not tell what it was; I can not hear so very good anyway, and then it was quite aways off.

Q. Once or twice you thought you heard something said, but you could not tell what it was?

A. Yes, sir.

Q. That was before the shooting, was it?

A. Yes, sir.

Q. Did you see Wilson after he was shot?

A. Yes, sir.

Q. You went up there, did you?

A. Yes, sir; I was the third one there.

Q. How was he lying when you were there?

A. If I remember right, he was lying on his back.

Q. Did you see any shots in his body?

A. All the shot I saw about him was right in here [indicating on left side of person].

Q. That was the only shot you saw?

A. Yes, sir. He was shot down here (in the leg) too, somewhere, but I could not tell just exactly where that was.

Q. You didn't notice where he was shot?

A. No, sir.

Q. Where was Wilson taken?

A. He was taken to Nenapa. That fellow took him up there.

Q. After the shooting became general—after these first two shots were fired, could you tell how they were shot? Could you distinguish who was shooting ea'h time, or who did the shooting, or was the shooting pretty general?

A. No, sir; I could not tell who shot the most, but goes to show from Wilson's pistol he shot one shot from his Winchester and five shots
163 from his six-shooter.

Q. How do you know?

A. Because there was five shots out of his six-shooter, and one left in it, if I remember right.

Q. If he hadn't had but five shots to start with he could not have shot but four out of his six shooter, could he?

A. No, sir.

Q. Who examined the six-shooter and guns?

A. We were all there and all looking at it.

Q. Wilson shot one shot from his Winchester?

A. Yes, sir; and the cartridge hung in it, or was when I seen it.

Q. Do you know how many shells there were in the Winchester?

A. No, sir; I don't know how many shells there were in the Winchester.

Q. Were there any shells in Henry's gun?

A. I don't know whether there was or not; I don't remember.

Q. Did you ever have any conversation with Henry before this thing occurred about the marshals being after him?

A. I have a few with him; not many.

Q. Did you ever hear him say anything about the marshals being after him?

A. No, sir; I never heard Henry say anything more than if he—that he wouldn't have killed that fellow if he hadn't shot like he did.

Q. I am talking about before this thing occurred. Did you ever hear him say anything about the marshals being after him before the shooting occurred?

A. Yes, sir; I heard Henry say something about it.

Q. What did he say about it?

A. He said they were after him; something that way; I don't remember exactly what he said about it; he said the marshals were after him.

164 Q. Did he say what for?

A. No, sir; he never did say what for.

Q. I want you to tell if Henry said anything to you about Floyd Wilson saying anything to him before he killed him.

A. All I remember him saying was that he said he was a man of family.

Q. Who said that?

A. Floyd Wilson.

Q. Told who?

A. Starr.

Q. That was during the shooting, was it?

A. Yes, sir; it was while they were there.

Q. What was it he said, now?

A. He said he was a man of a family, and he didn't want to hurt Starr and didn't want Starr to hurt him.

Q. What did Starr say he told him?

A. I believe Starr told him that he had better go to them, then.

Q. Was that before the shooting occurred or afterwards—I mean, was that before the shooting or after it began that Wilson said this to Starr, or was it during the shooting?

A. It was during the shooting, I guess.

Q. That Wilson said to Starr——

A. It may have been a little before the shooting.

Q. "I am a man of family. I don't want to hurt you, and I don't want you to hurt me;" and Starr told him he had better go to his family. Is that as you remember it?

A. Yes, sir.

Q. Do you know anything about what became of Starr after the shooting was over?

A. No, sir; he left, and I don't know what became of him.

Q. You don't know what became of Henry?

A. No, sir.

Q. You have stated that he told you before the shooting occurred
165 you had heard him say something about the marshals being after him.

A. Yes, sir.

Q. Did you ever hear him say anything about the marshals being after him after the shooting occurred?

A. I don't remember whether he ever did or not.

Q. Do you know whether he was scouting after Floyd Wilson was killed or not?

A. Yes, sir; I thought he was.

Mr. CLAYTON (of counsel for defendant). I do not think that is competent, if your honor please.

The DISTRICT ATTORNEY. State what led you to think that.

A. It looked like he was.

The COURT. State any facts you know as to his conduct and actions, what he was doing, where he put in his time, and what he would do.

The WITNESS. We just rode around over the country; he would come over where I staid and stop a little while, stop as long as he wanted to, and then get on his horse and ride off.

The DISTRICT ATTORNEY. Were you at Padget when he was there?

A. Yes, sir; was there several times when he was there.

Q. You say he would come there and ride off. Would he ever make any inquiries about the marshals—whether there were marshals around there or not?

A. I never remember of Henry asking anything about the marshals—whether they were there or not.

Q. Did you ever hear him say anything at all about the marshals looking for him or hunting him?

A. Yes, sir.

Q. What did he say?

A. I have heard him say that he thought the marshals were after him, or something that way; I can't remember just what it was.

Q. Was that after the killing of Wilson?

A. Yes, sir.

166 Q. And before, too, you say you heard it?

A. Yes, sir.

Q. Did you ever hear Starr make any statement as to whether or not he would surrender, as to whether the marshals could take him, or not; anything to that effect?

A. It seems to me I did. I remember hearing him say something about that he was not going to be taken, but I don't just remember when it was.

Q. Was that before or after the killing of Wilson?

A. I do not just remember when it was.

Cross-examination by W. H. H. CLAYTON:

Q. This conversation you talk about having with Mr. Starr, is that the conversation in which he told you that he would not have killed Wilson if Wilson had not shot him?

A. That is the conversation I remember of.

Q. That is the same conversation in which he told you that he would not have killed Wilson if Wilson hadn't shot at him?

A. Yes, sir.

Q. You were at Dodge's upon the day of the killing?

A. Yes, sir; I happened to go down there on that day.

Q. Where were you at the time of the shooting?

A. I was at the front of the house outside the gate?

Q. How far in front of the house?

A. Well, the gate to the best of my knowledge was about 25 or 30 yards, and I was outside the gate, about the same distance out on the ridge.

Q. About 25 or 30 yards beyond the gate, and the gate is about 25 or 30 yards from the house?

A. Yes, sir; maybe further.

167 Q. You were some nearer, then, to the killing than was the house; if you had been at the house you would have been a little further off?

A. Yes, sir.

Q. People who were at the house were further away from the killing than you were?

A. Yes, sir.

Q. You and Mr. Dodge were together?

A. We were together there at one time I know.

Q. Now, then, when Wilson rode down to where Starr was, Starr was going along quietly, was he not?

A. Yes, sir; he was riding off quietly.

Q. Did you ever see Starr try to jump on his horse, try to ride away from Wilson, or make his escape from him?

A. No, sir; I don't think I did.

Q. There was no effort upon his part to try to get away from Wilson, was there?

A. No, sir; I do not think there was.

Q. Made no effort to make his escape by riding away from him?

A. No, sir.

Q. You say that Wilson rode down near to where he was?

A. Yes, sir.

Q. You could not hear what was said?

A. No, sir.

Q. You could not tell any words that was said, could you, from where you were?

A. No, sir.

Q. That was because you were too far away?

A. Yes, sir.

Q. When Wilson rode down there did he ride in a gallop?

A. He rode faster than what I would call a gallop.

Q. He rode in a run?

A. Yes, sir; I would call it a run.

Q. Made his horse go as fast as he could?

A. Yes, sir; he went in a good speed.

168 Q. He didn't say anything until he got down there, did he?

A. No, sir; not that I heard.

Q. When he got down there, you say that he stopped; how far was he from Starr when he stopped?

A. When he stopped the first time he was quite a little distance from him; I don't know just how far it was.

Q. Seventy-five or 100 yards?

A. Yes, sir; I guess he was.

Q. They stood there a moment, and then you saw Starr lead his horse three or four steps off?

A. Yes, sir; started to lead off.

Q. And then Wilson jumped on his horse and rode to within a short distance of him?

A. Yes, sir.

Q. How far do you put it, 20 or 30 feet; or what?

A. I would think it was something about that; 20 or 30 feet, or 30 yards.

Q. There is a good deal of difference between 30 feet and 30 yards.

A. I always thought it was about 25 yards they were apart.

Q. You are putting it a good long ways. You have said before that it was as far as 'cross this house; was it that far?

A. Just about the same distance as across this house, maybe a little further.

Q. That is a good deal more than 25 or 30 feet. When they got that far Floyd Wilson got from his horse; when he rode up to him the second time he got from his horse?

A. Yes, sir; got off his horse.

Q. Then he got down on his knees and fired?

A. I don't know whether he was on his knees or not, but I
169 always thought that he got kind of down like and fired like this way [indicating.]

Q. Take this gun and show us how.

A. This way [indicating.]

Q. One one knee?

Yes, sir; that is the way I thought he fired; I don't know whether he was on his knees or not, but I don't think he was standing up.

Q. Of course, you did not see any daylight between the ground and his right knee, because you were a quarter of a mile away, but he was down in this position when he fired?

A. Yes, sir.

Q. That was the first shot that was fired?

A. Yes, sir.

Q. You say that Starr afterwards told you that he would not have killed Wilson if he had not tried to kill him, if he had not fired that first shot, and tried to kill him—I believe you stated that to me awhile ago?

A. I don't know anything about that, but Henry said he would not have killed him if he hadn't went to shooting at him the last time. That is the way it was said, as well as I remember it.

Q. When he got down on his knees and fired, or squatted, in the way you have pointed out, what was Henry doing?

A. Henry was standing quietly at the first time.

Q. With the muzzle of his gun on the ground, was he not?

A. I do not know whether he had the muzzle on the ground or not.

Q. He had it down towards the ground; he was not trying to shoot.

A. No, sir; he was not trying to shoot.

Q. He was not pointing the muzzle of the gun towards Wilson?

A. I don't know; but I don't think he was.

Q. I want you to state it; you have told everything you know against im; let's have what you know for him.

A. I am telling it like I know it.

170 Q. I think you ought to tell what you know for him as well as what you know against him; be fair, Miller. Very well. Henry was not trying to do anything at the time that Wilson got down on his knees and fired at him, was he? He was not trying to shoot Wilson then, was he, when Wilson got down and fired? Henry was not trying to shoot him then, was he, at the time that Wilson fired?

A. I don't think he was.

Q. Then when Wilson fired what did Henry do after that?

A. Henry fired.

Q. Did he raise his gun and fire?

A. Yes, sir; he raised his gun and fired.

Q. Then if he raised it, his gun was not raised when Wilson fired; that is all there is to that. He raised his gun and fired, did he?

A. He shot at Wilson after Wilson shot.
Q. Did he raise his gun?
A. I suppose he did.
Q. How did you see it; why do you suppose it?
A. I don't know just exactly how he had his gun. I saw him shoot.
Q. Did he shoot Wilson the first shot?
A. I could not say whether he hit Wilson the first shot or not.
Q. Did he shoot down this way?
A. He shot low.
Q. How do you know he shot low?
A. Because I heard Henry say that he shot low.
Q. I want you to tell what you saw.
A. I could not tell how the boy had his gun when he shot.
Q. You think he shot low because Wilson was squatted; that is one reason you think he shot low, is it not?
A. I don't know whether that is the reason he shot low or not?
Q. Didn't you see a shot down here in Wilson's leg?
A. He was shot down there, but I don't remember of seeing it.
171 I know we were all talking there about it. The only one I know of was right in here (indicating).
Q. Who fired the first shot?
A. Wilson.
Q. Who fired the next?
A. Henry Starr.
Q. Who fired the next?
A. I don't know; then there was a stoppage there, a pause there then; they stopped shooting for a little bit.
Q. Then who fired again?
A. Wilson fired again.
Q. Then Wilson fired the first shot, then there was a pause after the second shot, and then Wilson commenced it again?
A. Yes, sir.
Q. Then they kept firing one right after another after that?
A. Yes, sir; after that there were several shots fired.
Q. Until it ended by Starr killing him?
A. Yes, sir.
Q. Floyd Wilson was on the ground all the time, was he not? He had his feet from the ground, did he not?
A. Yes, sir.
Q. Laying down, kneeling, and turning over; did you see him turn over?
A. He was moving; I don't know whether he was turning over or not, but you could tell he was in a movement.
Q. And he was moving towards Starr?
A. I don't know whether he was moving towards Starr or not.
Q. I want to remind you of something you stated to the district attorney in your direct examination awhile ago: you stated they were both moving towards one another.
A. Starr was moving——
Q. You said they were both moving towards each other?
A. It must have been a mistake.

Q. Very well; which way was he moving?

A. Who?

172 Q. Wilson?

A. I could not say which way he was moving; he was moving.

Q. You know he was moving, whether from him——

A. I don't know whether he was moving from him or not.

Q. Or towards him; you don't know?

A. No, sir.

Q. You don't know but what he might have been rolling over towards him?

A. He may have been; I would not say; I could say he was moving.

Q. He fired the first shot while he was down in that way, and fired all the other shots down that way, did he, while he was down on the ground?

A. The first shot he fired he wasn't down on the ground that way.

Q. The first shot?

A. Yes, sir.

Q. He was squatted down?

A. He was kind of squatted down, but he wasn't standing up straight.

Q. Was he standing up straight at any shot that he fired?

A. I don't think he was; he wasn't as I know of.

Q. After the last shot was fired Henry left, did he not?

A. Yes, sir.

Q. You say that you think Henry fired the last shot with his pistol?

A. Yes, sir.

Q. Don't you know that he did?

A. Yes, sir; I do.

Q. You saw him shoot that shot?

A. Yes, sir.

Q. And it was with a pistol, was it not? You now admit it was a pistol. You ought to have been as certain in answering the district attorney as you are with me.

The DISTRICT ATTORNEY. I think so myself.

Mr. CLAYTON (of counsel for defendant). I understand you to

173 say that the last shot he fired at Wilson he fired with a pistol?

A. Yes, sir.

Q. He fired at Dickey afterwards, did he not?

A. Yes, sir.

Q. He fired that shot with a pistol, did he not?

A. He fired that shot with a pistol, I guess.

Q. You know you found his gun laying there where the fight was. You found both guns there, didn't you?

A. Yes, sir; Wilson's and Henry's both were there; the Winchesters were there.

Q. You did not examine the wounds particularly?

A. No, sir.

Q. You don't know much about them, how they were? When Henry ran towards his horse where was Dickey?

A. Dickey was quite a little peice from Wilson.

Q. What was he doing?

A. He stopped when Henry fired at him; when he fired at him he fell off on the opposite side of his horse.

Q. Then what did he do?
A. What did Dickey do?
Q. Yes, sir.
A. He got up and fired his shotgun; I guess it was a shotgun; it looked like it.
Q. When Starr fired at Dickey the fight with Wilson was over with, was it not?
A. It was over with.
Q. How far was he away from where Wilson was when he fired at Dickey?
A. How far was Henry away from Dickey?
Q. Yes, sir.
A. Not very far; just a little peice.
Q. Running towards his horse, was he not?
A. He was running towards the horse that he got; not his horse.
Q. Towards Dodge's horse?
A. Yes, sir.
Q. When Dickey fell from his horse how did he fall?
A. He fell off on the right-hand side.
Q. Did he shoot under his horse's neck?
174 A. I don't know whether he shot under his horse's neck or not; but anyway he was kind of at the head of the horse.
Q. Dickey was a little scared, was he not?
A. Yes, sir; he was. He was scared.
Q. Starr then got on his horse and rode off?
A. Yes, sir; he caught this horse and rode off.
Q. After that you went down to where Wilson was; you got there and found Starr's Winchester, and you found Mr. Wilson's Winchester, and you found Mr. Wilson's pistol; and Mr. Wilson's pistol had all the shots fired out?
A. All except one, I think.
Q. There was still one shot left?
A. There was one cartridge in his six-shooter, I believe that had not been snapped or fired.
Q. Were there five hulls?
A. Yes, sir; five hulls.
Q. There was no empty cylinder?
A. I don't think there was. I don't think there was any empty barrels but what had hulls in, except one, and that had a cartridge in it.
Q. In Wilson's pistol?
A. Yes, sir.
Q. The hulls were in there?
A. Yes, sir; all except one, and it was a cartridge.
Q. Five empty hulls and one cartridge that was not shot, and had not been snapped?
A. Yes, sir.
Q. Did you look around for the hulls?
A. Yes, sir; I picked up several hulls.
Q. Were both the guns the same size?
A. I don't think they were; no, sir, they wasn't. The gun that Wilson had was a larger gun than Henry had. It shot a larger cartridge.

Q. Was there an empty hull in Wilson's Winchester, or had that been thrown out.

175 A. The cartridge was in Wilson's gun, and the hull had been thrown out.

Q. Do you know how many hulls had been thrown out?

A. Only one, I guess.

Q. Do you know for certain?

A. Yes, sir; I am satisfied only one had been thrown out.

Q. Who found that?

A. It seem to me like I found that. I found one hull that had been thrown out of his gun. One cartridge was hung in there.

Q. I want you to think if you can remember that there was two empty hulls found there from Mr. Wilson's Winchester? Just think about it. I just want you to tell the way it was.

A. No, sir; I don't remember there was only one.

Q. Your recollection is that there was one?

A. Yes, sir; I found that, and if I remember right I gave it to a fellow named Vanmeter. I think I found the hull from Wilson's Winchester.

Q. How many loads were in Starr's Winchester?

A. I don't know.

Q. Were there any cartridges in the chamber of his Winchester?

A. It seems to me like there was one. I am not positive, but it seems like there was one cartridge in his Winchester. I might be mistaken in that too.

Q. When you found Wilson's pistol was it cocked, or was the hammer down, or do you remember?

A. I don't know.

Q. You don't know whether it was still cocked, or whether the hammer was down?

A. No, sir.

Q. His pistol was between his arm and his side, or do you remember?

A. I don't know anything about that.

Q. They got it before you got down there; some of the others, or was it still on his person?

176 A. No, I think not; if I remember aright the pistol was kind of under his right——

Q. You don't remember much about that. You don't seem to remember much about that part of it. Do you remember about what time this was?

A. No, sir; I do not.

Q. It was in December?

A. Yes, sir; but what day I don't remember.

Q. Did you see Mr. Padget off in the field plowing?

A. Yes, sir; how I come to be out there at Dodge's, I had a kind of a felon in my hand here, and I had it lanced, and that is how I come not to be working.

Q. When you came down to the stable, did you see where Wilson and Dickey were?

A. When I went down to the stable after I left the house, went down to the stable, it seemed to me like I heard some one holler halt to me, and I stopped and looked around, and saw nobody; but still I seen Henry coming along.

Q. That was away off?
A. Yes, sir.
Q. He must have been nearly a mile from you at that time?
A. Yes, sir; about.
Q. Where was it you heard the person hollo "halt?"
A. I might have been mistaken, but I thought I heard a person holler "halt."
Q. Near you?
A. Yes, sir; it sounded like it was close.
Q. It wasn't Henry?
A. No, sir, it wasn't Henry. I went down to the barn, and hadn't any more than got there until I saw Wilson coming; I always did think it was one of these fellows that hollored "halt" at me. I looked around, and I didn't see anybody, and I went on.
Q. You didn't know they were in the loft?
A. No, sir; they were not in any hay loft when I was there.
177 Q. You don't know that they had been there?
A. They may have been there, but they were in no hay lofe when I saw them, becaaue Dickey coming running down there, down the path, and Wilson and Dickey—that is, Wilcon came down the path, and Dickey still remained there.
Q. Where?
A. Up there near the house.
Q. How long had you been there?
A. I had been there just a very few minutes.
Q. What sort of a house is that smoke house?
A. It is a log house.
Q. Was a fellow inside of that log house holloing at you.
A. In my mind I will say that they were in there when I heard that noise; although I might have been mistaken.
Q. You did not see any guns sticking out between the logs?
A. No, sir, I did not; if I had I would have flew (laughter).
Witness excused.

178 JULIUS ORLICK, having been duly sworn upon behalf of the Government, was examined by the district attorney, Hon. James F. Read; testified as follows, to wit:

Question. Where do you live?
Answer. I live right here, in Fort Smith. I am staying at Mr. John Kelly's.
Q. You life in Fort Smith, then?
A. Yes, sir.
Q. Did you see Floyd Wilson after he was shot?
A. Yes, sir.
Q. Where did you see him?
A. They fetched him down to his house from the Nation.
Q. Did you examine him to see where the wounds were on him?
A. I did not examine his body, but I did the clothes.
Q. Where were the clothes?
A. They were at Mr. Kelly's house.
Q. Where were the holes?

A. Right through here some place, and it was powder bruned [indicating in front part of his body] through his vest.

Q. What kind of a vest was it?

A. A little lighter than this.

Q. You say the vest was powder burned?

A. Yes, sir.

Q. Did you see any other shots around anywhere?

A. Yes, sir; another shot right here (in the side of person) and another shot in the leg, and one right here (in thigh) in his pants. The shot in the breast here came out here, and this one here came out here.

Q. And over his breast was powder burned?

A. Yes, sir.

Q. You examined these wounds from the clothing?

A. Yes, sir.

Q. You did not examine the body itself?

A. No, sir; I did not examine the body, but simply examined
179 the clothing, and very particularly, too.

Q. You were with the body when it was brought from the Territory, were you not?

A. Yes, sir.

Cross-examination by Mr. W. H. H. CLAYTON:

Q. Where was the first shot you mentioned?

A. There was several shots I seen.

Q. I didn't ask you how many there was. I asked you where was the first shot you named.

A. Right here (in breast).

Q. Where did that go?

A. It went through.

Q. Where did it come out at?

A. Right here [indicating in the back].

Q. Where are those clothing?

A. They are burned. Mrs. Wilson was so excited that the old lady sent word to brun them.

Red Kelly, Mrs. Wilson's brother, has burned the clothes?

A. Yes, sir.

Q. You live with him?

A. Yes, sir.

Q. When were they burned, and why?

A. Because Mrs. Wilson was excited so, and they didn't want her to see them, and they burnt them.

Q. How long after this killing was it that Red Kelly burned this clothing?

A. Maybe it was four or five days afterwards.

Q. Floyd Wilson had been brought here at that time?

A. Yes, sir.

Q. Who was the district attorney here in this court at that time?

A. I could not tell you.

180 The COURT. Mr. Clayton was.

Mr. CLAYTON (of counsel for defense). Mr. Clayton was; and Mr. Clayton didn't burn the clothes, if your honor please. He does not do

a thing like that; he produces them. He is the kind of a man that always does produce them, and your honor knows it. (To the witness.) You say it was four or five days after that that Red Kelly burned them?

A. It may have been six days.

Q. Red Kelly lives in this town?

A. Yes, sir.

Q. How far does he live from my residence, from where I live?

A. He was right in his residence.

Q. How far does he live from where I live?

A. I could not tell.

Q. How far does he live from where the judge of this court lives?

A. The judge lives on 16th street and Mr. Kelly lives on Burns street.

Q. How far does he live from where the marshal of this court lives, and all the officers here; they all live in the same town?

A. Yes, sir.

Q. Were these clothing produced and shown to any officer of this Government?

A. I could not tell you, sir. There is witnesses for that, I reckon.

Q. How long have you lived with Red Kelly?

A. Three years.

Q. What is your business?

A. Buying and selling horses.

Q. Horse trader?

A. Yes, sir; that is what some call it; I do not; I buy and sell horses.

Q. What do you call it?

A. Horse dealer.

Q. Horse broker or commissioner in horse flesh. You have been trading horses for Red, haven't you?

A. Yes, sir; and for myself, too.

181 Q. You generally trade for these horses that come from the Indian country?

A. I do wherever I can get any.

Q. Where was that shot on the leg?

A. It was right here; I could not say whether it was the left or right leg.

Q. What are you putting your hand on the left leg for? Why didn't you put your hand on the right leg sometimes?

A. I could not say positive which leg it was, but I know this one right here [indicating on front part of the body] was on the left.

Q. Every shot that he received was in front and on the left side, was it not?

A. This shot in front here, and this shot here was on the right side.

Q. Was there one on the right side?

A. Yes, sir.

Q. Where did that go?

A. Right through here.

Q. The one on the left side to the front came out behind?

A. Yes, sir; the both shots came together.

Q. Wasn't there a shot up here on his thigh in front?

A. Not that I saw; there was no shot there at all that I saw.

Q. No shot in the thigh?

A. Not that I saw.

Q. Who did you show this clothing to?
A. Me and Mr. Kelly looked at it.
Q. Just you and Mr. Kelly?
A. Yes, sir.
Q. Did you have a doctor to probe the wounds?
A. I don't know that you have to have any doctor for the clothes.
Q. Do you know whether there was a physician or surgeon examined the body?
A. No, sir; I could not tell you.
Q. Did anybody see the clothing but you and Red Kelly?
A. Maybe somebody else did; I could not say; but when I looked at them there was nobody but Mr. Kelly and me.
182 Q. What were you looking at the clothing for?
A. At Mr. Kelly's place.
Q. Why were you doing it?
A. Because we wanted to see where he was shot.
Q. What did you want to see for?
A. Because.
Q. You wanted to see so you would be able to tell it afterwards?
A. Yes, sir.
Q. So you would be able to come in court and tell just how it was done, didn't you?
A. Yes, sir.
Q. That was the reason?
A. Yes, sir.
Q. Did Mr. Kelly tell you that was the reason?
A. No, sir; I just went and looked at the clothes where he was shot; I did not care anything about the court, or nothing about it at all.
Q. That was the reason——
A. I didn't say the reason; I just went to look at the clothes.
Q. Don't tell me you didn't say the reason, when your breath is not cold after having stated it.
The DISTRICT ATTORNEY. The witness does not understand you.
Mr. CLAYTON (of counsel for defendant). Do you think he don't. [To the witness.] How long had you known Floyd Wilson?
A. Ever since I come to Fort Smith.
Q. You didn't know him in the regular Army?
A. No, sir.
Q. Did you know that he was in the regular Army at one time?
A. I heard about it.
Q. Fighting Indians?
A. I heard about it, but I did not see him there.
Q. Where did you come from?
A. Germany.
Q. When did you leave Germany?
A. About 12 years ago.
183 Q. Are you a Frenchman?
A. No, sir; I am a German; there might be some French in me.
Q. When did you land in Castle Garden, New York?
A. On the 11th day of March, I believe.
Q. How many years ago?

A. Twelve years ago.
Q. You speak French, don't you?
A. No, sir; German.
Q. When did you come to Arkansas?
A. I was in Arkansas five years ago.
Q. What part?
A. I was all over Arkansas.
Witness excused.

184 JOHN KELLY, having been duly sworn upon behalf of the Government, and examined by the district attorney, Hon. James F. Read, testifying as follows, to wit:

Question. What is your name?
Answer. John Kelly.
Q. Where do you live?
A. I live here in the city.
Q. How long have you lived here?
A. I was born and raised here.
Q. Did you know Floyd Wilson?
A. Yes, sir; he was a brother-in-law of mine.
Q. How long had Floyd lived here?
A. I could not say—seven or eight years.
Q. Was he a white man?
A. Yes, sir.
Q. Citizen of this country?
A. Yes, sir; a citizen of Arkansas.
Q. Do you know about what aged man he was?
A. 31 or 32 years old, I think.
The COURT. Lived here in Fort Smith, did he?
A. Yes, sir.
The DISTRICT ATTORNEY. About what size man was he?
A. He was a man about my height.
Q. About Mr. McDounough's size?
A. Yes, sir; maybe a little larger.
Q. He was not as heavy a man as you?
A. No, sir; I think he weighed 150 or 155 pounds.
Q. Where were you at the time that Floyd Wilson was killed?
A. I was here in this city.
Q. You say he married your sister?
A. Yes, sir.
Q. Where did she reside?
A. She resided here in the city.
185 Q. Did you examine Floyd's body after he was shot?
A. No, sir.
Q. Did you examine his clothing?
A. Yes, sir.
Q. Who brought him here?
A. I think Mr. Johnson came with him, and also Clarance Ownsby. I asked him to go up when we got word that he was killed.
Mr. CRAVENS (of counsel for defense). What Johnson is that?
The WITNESS. He is a route agent, I think; I don't know what his initials are.

The DISTRICT ATTORNEY. What became of the clothing?

A. They were burned.

Q. Now, tell why they were burned and who you got them from?

A. It seemed to unbalance my sister, and she was always asking for the clothes. Mr. Ownsby brought them to me, and I taken them home, and my mother asked me to do away with them, and I asked one or two parties if they thought they needed them, and they said no, they didn't think they would, and they were all cut up anyway; they were of no use, with the exception of a pair of pants. A fellow I had working for me, he taken the pair of pants—corduroy pants. There was a coat and vest and a pair of socks, and pair of drawers.

Q. How were the clothes cut?

A. Taking them off of him; the vest was cut across here.

Q. Why was it you say they were burned?

A. My mother kept telling me to do something with them; she asked me to burn them.

Q. Why was that?

A. On account of my sister. She had jumped up out of bed and started down to my house once or twice, so I had been informed; I didn't know that as a fact myself.

Q. Do you know of your sister getting hold of any part of the
186 clothing at any time?

A. No, sir; I don't think she ever got them.

Q. What was your sister's condition at that time, physically and mentally?

A. It was in a pretty bad shape; and she is right now. We had a couple of doctors with her for a week or ten days afterwards.

Q. Was she in that condition at the time that Floyd was killed or afterwards?

A. Afterwards; the shock seemed to unbalance her.

Q. Do you know of her calling for the clothes?

A. Yes, sir.

Q. And that is the reason you burned them?

A. Yes, sir; they brought me a watch, and I believe there was a little money, probably a pencil, and something like that, and I told her that was all there was; that the rest was in Coffeyville, and she did not know where they were.

Q. You burned them to keep her from getting hold of them at any time?

A. Yes, sir; and they were all bloody and everything; every place there was a hole there was blood on it.

Q. Where were the holes in the clothing? Describe the holes as near as you can.

A. There was a hole right here in the side that came out back here. There was a hole right up here, about middle ways here. The first one was on the left side above the point of the hip, and the second one was down here in the vest and came out up above this place here, and he was shot across the thigh here, and then on the other side he was shot here; the pocket in his pants was cut down a little on this side. And then he was shot once in his ankle and came out here.

Q. How many holes were there in the clothing?

A. They went in and came out—I counted five.

187 Q. Where they went in and came out?

A. Yes, sir; all but this one here that didn't come out; there were four that went in and came out, and that would make four holes; and the one in his pants.

Q. The holes indicated there had been five wounds?

A. Yes, sir.

Q. Did you notice any powder burn about the vest?

A. Yes, sir; this hole here.

Q. What color vest was that? Was it lighter than that you have on?

A. Yes, sir; it was a kind of a cross-bar.

Q. Starr had not been arrested at the time these cloth's were burned, had he, or how long was it after Wilson's death?

A. I burned them four or five days after his death.

Q. Was Starr under arrest at that time?

A. No, sir.

Q. He had not surrendered to anybody that you had heard of?

A. No, sir.

Cross-examination by Mr. W. H. H. CLAYTON:

Q. Where was that shot in the left ankle?

A. It was right here.

Q. That went in behind, did it not?

A. It went through his sock and came out of his pants.

Q. That was shot right behind, was it not?

A. It may have been a little to the side; it was not direct with the back of the heel. I could not say whether it was the right or left side it went in.

Q. There was no shot went in in front here?

A. None that I saw.

188 Q. If he had been laying on his back you could not have seen that shot here, could you?

A. I don't know whether you could or not.

Q. You ought to know.

A. It is according to how his clothes were.

Q. If he was laying naturally on his back you could not have seen that shot?

A. I don't know how he was lying.

Q. I did not ask you to tell me that.

A. I could not tell whether I could or not.

Q. Why can't you say?

A. Because I did not see him lying.

Q. Is it your opinion it was on the side of the heel?

A. Yes, sir; it would have been on the side of the wheel; I could not say which side.

Q. Was there any upon the left leg?

A. Right around here.

Q. How many?

A. Two, I think; maybe two or one, I can't say.

Q. I thought I understood you to say all along that there were two shots up there?

A. I thought there was; yes, sir; I would not say positive.

Q. In the thigh?

A. No, sir; in this way like [indicating]. I put it that he was standing this way when he got shot; that he turned, probably, this way when he used his six-shooter and got shot here. Of course, I don't know that.

Q. He had two shots through here, and one in front, and then one on the side of the leg, more to one side, and if he had two on his side it would make six?

A. Yes, sir; if had two there; I am not positive about two.

Q. But your recollection now is that there was five where you have located them?

A. Yes, sir; there was five; and if there was two here there would be six.

189 Q. Let's count them again. One in the left let, and one in here (thigh), and one through here (side); now name the nest one.

A. There was one right here (in front of body).

Q. Where was the next one?

A. Along here (in the right side).

Q. How old did you say Floyd Wilson was?

A. I don't really know, but I think he was something between 30 and 32.

Q. Do you know whether he had ever been on the plains or not in the regular Army? On the plains fighting Indians?

A. No, sir; he was stationed at Fort Gibson; enlisted in Ohio.

Q. In the regular Army?

A. Yes, sir.

Q. Do you know how long he had been in the regular Army?

A. I think he served somewheres near three years, and got released on account *on account* of his youth; something that way. I think he had an uncle in Kansas——

Q. Was that before or after the war?

A. After the war. The first time I ever saw him he was a soldier.

Q. In the regular Army?

A. Here, attending court.

Q. Where did you see him?

A. Here, in Fort Smith, as a witness.

Redirect examination by the DISTRICT ATTORNEY:

Q. How old was he at that time?

A. He must have been 21 or 2 or 3; he was smooth-faced.

Q. Do you know how long he served in the regular Army?

A. I think he staid a couple of years.

Q. At Fort Gibson?

A. Yes, sir.

Q. Do you know how long he rode as a deputy marshal here?

A. Not exactly. He rode off and on as a marshal.

190 Q. Do you know what country he rode in, and where he rode?

A. He rode in the Cherokee and Creek Nations.

Q. Do you know Henry Starr?

A. No, sir.

Q. You never knew him?

A. No, sir.

Q. Do you know whether Wilson knew him or not?
A. Yes, sir; I believe he did.
Mr. CLAYTON (of counsel for defendant). Hold on.
The WITNESS. I know he did. I have heard him say he did.
The DISTRICT ATTORNEY. You heard Wilson say that?
A. Yes, sir.
The DISTRICT ATTORNEY. If that is objected to I will withdraw the question. I do not desire to get in anything that is incompetent.
The COURT (to witness). Did you go up into this country to arrest Starr after the killing?
A. I went up once with a crowd.
Q. Did you find him?
A. No, sir.
Q. Did you make search for him?
A. Yes, sir.
Q. Where did you search?
A. We went to Nowata and got horses there and went out on the Verdigris; there was some deputies along.
Q. How long were you engaged in the search?
A. I think we were out three days.
Q. Deputy marshals along?
A. Yes, sir; two or three deputy marshals along.
Q. You could not find him, you say?
A. No, sir; we heard there was a large crowd after him, and we knew there was no use of us staying, and so we came back.
Witness excused.
Here court took a short recess.

191 OSCAR JOHNSON, having been duly sworn upon behalf of the Government, was examined by the district attorney, Hon. James F. Read, and testified as follows, to wit:
Question. What is your name?
Answer. Oscar H. Johnson.
Q. Where do you live?
A. Fort Smith.
Q. What business are you in?
A. Express business.
Q. You are an agent of the express company?
A. I am route agent.
Q. For what company?
A. Pacific Express Company.
Q. Did you see Floyd Wilson after he was killed?
A. Yes, sir; I did.
Q. Where?
A. Coffeyville.
Q. Did you dress him, or help to dress him?
A. Yes, sir.
Q. Did you examine his wounds?
A. Yes, sir; I did.
Q. Where were they? You examined them at Coffeyville, Kansas?
A. Yes, sir.

Q. You helped undress him, did you?
A. Yes, sir.
Q. Describe to the jury his wounds now, if you can.
A. To the best of my recollection, he was shot through the right leg here and I think this leg in here. He was shot right in front, about here, and I think it came out, went across this way here. He was shot right about in here, and it came out along this way here. He was shot right in here, and it came out about here.
Q. How many wounds were there in his body?
A. I think I counted five bullet holes.
Q. You speak of "in here," was it in his hip?
192 A. I think one shot was right through this leg here.
Q. Right leg?
A. Yes, sir; between the ankle and knee, and came out over into this leg (right). That is the best of my recollection.
Another struck him just below the pocket, right in front of this seam here, on the right leg, and came out, went across this way (on left leg). Another shot struck him just below the left vest pocket in front, and came out just below the shoulder blade; another shot struck him right in the back, and came out about six inches on this side.

Cross-examination by Mr. W. H. H. CLAYTON:

Q. What is your occupation?
A. Route agent for the Pacific Express Company.
Q. Did you ever study surgery?
A. No, sir.
Q. You are not a surgeon?
A. No, sir.
Q. These bullets made holes in the man's clothing, did they not?
A. Yes, sir.
Q. Persons who examined the clothing would see these holes as well as you?
A. I should think so; yes, sir.
Q. Who was present when you made that examination?
A. I believe Mr. Laney, the undertaker, and his assistant.
Q. He is not here?
A. No, sir.
Q. Was there anybody present that is here?
A. I think that Clarence Ownsby was present.
Q. You say that he was shot through the right leg here?
A. Yes, sir.
193 Q. The ball penetrated through his pantaloons; is that right?
A. Yes, sir.
Q. And passed out upon that side, through his pantaloons, upon the right leg, making two holes through the pants, the right leg here?
A. Yes, sir.
Q. Below the knee?
A. Yes, sir; and passed through the calf of his leg.
Q. Did it break the bone?
A. I didn't examine it.
Q. That ball went into the left leg?
A. Yes, sir.

Q. Did it go through?
A. I don't remember whether it did or not.
Q. How many holes did it make in the pantaloons on the left side?
A. I didn't examine.
Q. Then, upon the right side there was a shot in the pants below the pocket?
A. Yes, sir.
Q. That passed through here and came out on the inside?
A. Yes, sir.
Q. And then cut two holes through the pants here?
A. I did not examine the pants; I just examined his person.
Q. It cut a hole through the flesh here, then?
A. I think it just burned across his leg.
Q. Burned his leg?
A. Yes, sir.
Q. He was naked when you saw him?
A. Yes, sir.
Q. So you don't know whether it cut his pants or not?
A. No, sir.
Q. But you do know it burned his flesh?
A. Yes, sir.

Q. A ball could hardly burn the flesh of a man without cut-
194 ting his pants, could it?

A. I would not think it would.
Q. It went clear into the right thigh and passed into across on the other, on the front of the left thigh?
A. Yes, sir.
Q. Then you say there was a shot entered on the left side; where did that go, where did it come out?
A. It came out under the shoulder blade.
Q. Then there was one that entered his back?
A. Yes, sir.
Q. That came out under his arm?
A. Yes, sir; nearly so.
Q. That ball went into his back, did it?
A. Yes, sir.
Q. Did it go pretty deep?
A. I don't think it did.
Q. Glancing shot?
A. Yes, sir; I imagine so from the appearance of the shot. I didn't examine it thoroughly; I just saw the hole.
Q. You are certain of the location of these shots?
A. Reasonably so; that is the best of my recollection.
Q. You remember the one in the right leg as well as you do any other, do you not?
A. Yes, sir.
Q. You are right certain there was one in the right leg?
A. That is the best of my recollection.
Q. You are as certain there was one in his right leg as you are that there was one in his back, are you not?
A. Yes, sir.

Q. The one that entered in the left breast came out under the left shoulder, did it not?

A. Yes, sir.

Q. Entered how far to the left of the median line?

A. I should think two inches.

Q. That must have been a sort of glancing shot, was it not?

A. I don't believe it was.

Q. You have not described any shot that would prove necessarily fatal yet; what was the fatal shot?

195 A. I think the shot that entered here was.

Q. The shot that entered two inches to the left and came out under his left shoulder blade that way?

A. Yes, sir; it came out pretty nearly opposite where it went in.

Q. Who took his clothing off?

A. I assisted in doing it; I assisted the undertaker and his assistant in taking them off.

Q. You saw him when he was clothed and afterwards?

A. Yes, sir.

Q. What became of his clothing?

A. It was rolled up in a bundle.

Q. All of them?

A. Yes, sir.

Q. Was his shirt rolled up in the bundle?

A. Yes, sir.

Q. Was his shirt not left there?

A. I don't think it was.

Q. Do you know?

A. No, sir; I don't.

Q. You didn't roll them up, did you?

A. No, sir; I helped to tie them up.

Q. Where do you live now?

A. Fort Smith.

Q. How long have you lived here?

A. I have lived here since about the first of April, 1891.

Q. The ball which entered in the back came out under the left arm?

A. Yes, sir; it didn't come out around under the arm.

Q. About where did it come out?

A. As near as I can remember it struck about in here and came out about here [indicating].

Q. Just simply a glancing shot, raking across that way, then?

A. Yes, sir; where it entered it seemed to me was higher than where it came out. The shot was down.

Q. Kind of range down and across?

A. Yes, sir.

196 Q. That wasn't a very deep shot?

A. No, sir; I don't think it was.

Q. The man must have been pretty close to him, shooting across the way you say?

A. Yes, sir.

Q. The way you put it, the man must have fired when the right side of the deceased was to him, or nearly to him?

A. That was the way I put it.

Q. You say that the shot ranged down and went into the back, ranged across the back?

A. Yes, sir.

Q. How much lower was it at the place you thought it came out than the place you thought it went in?

A. Well, perhaps an inch.

Q. An inch lower?

A. Yes, sir.

Q. A distance then of some four inches?

A. The distance was about from four to six.

Q. Was it ranged across the muscles of the back?

A. Yes, sir.

Q. You thought it was about an inch lower?

A. Yes, sir; I think it was about an inch lower.

Q. Did you make a close examination or a casual?

A. Yes, sir; I examined the wounds in his breast here and the one in the back. I examined this more particularly than the others.

Q. What was your object in examinating them?

A. The one in the breast I considered the one that killed him, and the one in the back, I could not understand how he was shot there.

Q. I asked you what your object in examining them was?

A. Courisoty.

Q. Just simply that?

A. Yes, sir.

Q. You were not examining him with a view to testifying in
197 regard to the matter?

A. No, sir.

Q. Nor storing your memory?

A. No, sir.

Q. This was last December?

A. Yes, sir.

Q. About a year ago?

A. Yes, sir.

Q. How was he lying when you examined him?

A. He was turned on his right side. They had turned him over to get his clothes off and wash him.

Q. Did you examine him before he was washed or afterwards?

A. At the time.

Q. At the time they were washing?

A. Yes, sir.

Q. What part of Coffeyville was that?

A. At the depot.

Q. Did you know Mr. Wilson?

A. Yes, sir.

Q. How long had you known him?

A. I had known him from about June, I think.

Q. About the June before?

A. Yes, sir; I had known him about 6 months.

Q. There was no intimacy between you and he, or was there?

A. We were pretty good friends.

Q. For six months' acquaintance?
A. Yes, sir.
Q. You were the agent there at that time, were you?
A. No, sir.
Q. What was your business?
A. I had charge of the express business.
Q. Up there?
A. From here to Coffeyville.
Q. At that time?
A. Yes, sir.
Q. You were express agent?
A. Yes, sir; route agent.
Q. When you said "No" you didn't understand the question, I guess?
A. No, sir.

198 Q. Did you see Wilson before he got to Coffeyville after he was killed?
A. No, sir.
Q. When did you first see him when he had his clothing on?
A. At the office in Coffeyville, the depot office where he was dressed.
Q. How long after that was it before you undressed him?
A. I should think it was about 2 hours at least.
Q. Did he have his clothing on during that time?
A. Yes, sir.
Q. All of them?
A. Yes, sir.
Q. You helped take them off?
A. Yes, sir.
Q. Did you take off his shirt?
A. I think I helped take it off, and helped take off his clothing?
Q. How long was that after he was killed?
A. I don't know what time he was killed in the afternoon, but this was about one o'clock at night that we dressed him.
Q. You say him in the night time?
A. Yes, sir.
Q. Did you make your examination by lamp light?
A. Yes, sir.
Witness excused.
Government rests.

199 This was all of the testimony offered in chief by the United States; and the defendant, to maintain the issues on his part, recalled and examined John Kelley, Arthur Dodge, Emmet Miller, and called and examined Mrs. Lizzie Lipsey, which said witnesses testified as follows:

200 *Testimony offered on behalf of the defendant.*

JOHN KELLY, upon being recalled by the defendant for further cross-examination, was examined by Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. When you were on the stand before you stated that you saw the clothing of Mr. Wilson, who was your brother-in-law, and you described the clothing; what clothing did you say was brought back?

Answer. There was a coat, a dress coat, and there was an overcoat, and a hat, and drawers, and a pair of corduroy pants.

Q. Overalls also?

A. No, sir.

Q. You did not see his overalls?

A. No, sir; he did not have any.

Q. Did he have a vest?

A. Yes, sir.

Q. Shirt?

A. Yes, sir; the shirt was not brought back.

Q. So you did not see his shirt?

A. No, sir.

Q. You described the places in his clothing, not particularly in the coat, but pants, vest, and drawers.

A. I did not see any hole in his coat.

Q. Did you examine it?

A. Yes, sir.

Q. No hole in the coat?

A. I could not find any.

Q. Was that overcoat brought back?

A. Yes, sir.

A. Any holes in that?

A. No, sir.

Q. You are certain of that?

A. I think I am; that is my best recollection; I don't think I
201 found any hole in the overcoat; I am not positive; I don't know whether there was any in the dress coat.

Q. He wore a dress coat when he left here, did he not, and took an overcoat with him?

A. His overcoat was brought back; I guess it was taken with him.

Q. The shirt was not brought back?

A. No, sir; his drawers, pants, vest, overcoat, dress coat, hat, pair of shoes, and socks.

Q. Have you described all the holes there was in the clothing?

A. I think I have.

Q. You have stated all?

A. Yes, sir; that is my recollection about it.

Q. Did you examine them with a view to ascertaining the number of holes?

A. I just wanted to see how badly he was shot up. I did not think I would ever have to testify. He had been killed and he was an officer.

Q. You examined them, and the clothing had the holes you have described; he had no shirt, but an overcoat, and the dress coat which were brought back?

A. Yes, sir.

Q. You knew the weapons that he carried, didn't you?

A. Yes, sir.

Q. What were his weapons?

A. He had a Winchester and a six-shooter.

Q. What kind of a Winchester was it; what size, what caliber?

A. Either a 38 or 56, I don't know which.

Q. What kind of a pistol did he carry?
A. A 45 pistol.
Q. Army or Navy size?
A. A 45 Army size.
Q. Was it one of these self-cocking pistols?
A. No, sir.
Q. Not double action?
A. No, sir.
202 Q. A 45 calibre pistol, was it?
A. Yes, sir.
Q. And one of these that you have to cock?
A. Yes, sir.
Q. You can not pull the trigger, and it will cock itself?
A. No, sir.
Q. Do you know the kind of cartridges that he used in his gun, whether he used long or short cartridges?
A. Long cartridges for the Winchester.
Q. He could not use long Winchester cartridges for his pistol, could he?
A. No, sir; I got the pistol back and the gun also. Mr. Ferrier has it now, I believe.
Q. Have you got the pistol now?
A. No, sir; I sold it. There was one load in it when I got it, and four empty hulls and one empty chamber. He always carried five in it.
Q. I believe you have stated his age and his weight?
A. Yes, sir; that is my recollection; I am not positive about what it was.

Redirect examination by the DISTRICT ATTORNEY:

Q. You say there were four empty shells, one loaded one, and one empty chamber?
A. Yes, sir.
Q. Do you know how he carried his pistol?
A. Five loads in it, always one empty; I have been with him on several trips.
Q. He always carried his pistol that way?
A. Yes, sir.

Witness excused.

203 ARTHUR DODGE, having been duly sworn and examined upon behalf of the Government, was recalled for further cross-examination by the defendant, and testified as follows, being examined by Mr. W. H. H. Clayton:

Question. I believe you say it was near the 13th of December when this killing occurred, didn't you, or it was in December, some time?
Answer. Yes, sir; I believe it was; in December, if I remember.
Q. Please state what kind of a coat Floyd Wilson had on; how he was dressed, more particularly as to the kind of a coat he had on?
A. I do not believe I could state positively.
Q. Did he have an overcoat?
A. He had an overcoat with him, as I remember.
Q. Did he have it on at the time he was killed?

A. No, sir; I don't think he had; I do not remember positively.

Q. Which one of his coats did he have on; he was not in his shirt sleeves, *did* he?

A. No, sir.

Q. He had a coat on, did he not?

A. I presume he had a coat on; I am positive he had a coat on.

Q. You knew that he was not in his shirt sleeves; you knew he had a coat on?

A. I know he had a coat on.

Q. Do you remember of his having a dress coat and overcoat?

A. I remember about his having two coats, but I do not remember positively about the color, or anything of that kind.

Q. You know that he had his coat on at the time that he was shot?

A. Yes, sir; he had a coat on.

204 Redirect examination by the ASSISTANT DISTRICT ATTORNEY:

Q. That was last December?

A. December, 1892. It was the time of that transaction.

Q. That was last December?

A. Yes, sir.

The COURT. This killing was in the Cherokee Nation, was it?

A. Yes, sir.

Witness excused.

Here court took a recess until 1:30 p. m.

205 AFTERNOON SESSION.

OCTOBER 18, 1893. (2:30 o'clock p. m.)

The DISTRICT ATTORNEY. Before the defense go on with their testimony, Mr. John Kelly, the witness who was on the stand before dinner, tells me that he wants to make an explanation of a statement he made before dinner.

The COURT. Very well.

JOHN KELLY, having been recalled in order to make an explanation of his former testimony, testified as follows:

Q. Just before dinner you were asked in regard to whether where was any bullet holes in the coat that Floyd Wilson had; what was your answer to that?

A. I said there was none.

Q. What do you mean by that?

A. In front of it.

Q. You stated to Mr. Clayton, and referred to the front of the coat?

A. Yes, sir.

Q. Were there any bullet holes in it at all, and if so where were they?

A. In the back of it.

Q. Whereabouts in the back?

A. Right along here about the shoulder blade.

Q. How many bullet holes?

A. One hole; a hole about as big as my hand; it looked to me like it was made by two balls; you could tell there was two bullet holes.

Q. You did not state about that hole this morning, did you?

A. I don't remember whether I did or not. Mr. Clayton the last time he called me here, he asked me if there was any holes in the coat,
206 and had his hand here [indicating in front], and I told him I didn't see any; I meant in the front of the coat.

Recross examination by Mr. W. H. H. CLAYTON.

Q. Why did you mean in the front of the coat; I did not say that?

A. You kept marking this way with your finger, kept holding your hand that way [indicating in front].

Q. You answered me there was no bullet hole in the coat?

A. In the front of the coat I mean, the way I answered your question.

Q. I didn't ask you if there was any hole in the front of the coat?

A. You held it this way.

Q. I suppose you meant there was no bullet hole in the front of the coat, and in the tail of the coat, and in the sleeves of the coat, and not any in the whole coat?

A. I meant only where you were marking.

Q. You say there was one under the left shoulder blade?

A. Here, about that high up.

Q. About as big as your hand?

A. Yes, sir.

Q. That was a pretty big bullet hole?

A. Yes, sir; the coat was busted out.

Q. Was it ripped?

A. No, sir; it was no rip; it was busted.

Q. Blown out that way?

A. Yes, sir; I don't know whether it was blown out or what?

Q. That is not the place you saw the powder burn?

A. No, sir; it was in the vest, I saw the powder burn.

The COURT. Was the vest burned?

A. Yes, sir.

207 Mr. CLAYTON (of counsel for defendant). Did it look like it had been afire?

A. It looked like it had been pretty badly scorched.

Q. Been afire and blazed, according to your judgment?

A. I could not say whether it blazed or anything like that; it was powder burned.

Witness excused.

208 EMMETT MILLER, upon being recalled by the defense, was examined by Mr. W. H. H. Clayton, and testified as follows, to wit:

Q. Before dinner, when you were on the stand, you testified as to a conversation that you had with Henry Starr, in which he told you certain things, in which he told you that Wilson had told him that he had a family of children, and in which he told you he would not have killed Wilson if he had not fired upon him—if he had not commenced firing upon him at the second fire.

Q. Now, I want to ask you if at that time he told you whether he knew that Wilson was an officer or not at the time of the fight?

A. No, sir.

Q. What did he say about that?

A. Henry said he didn't know they were officers.

Q. He told you he did not know they were officers?

A. Yes, sir. When he saw that fellow coming out on that horse he thought it was Billy Frankling, or some of Arthur Dodge's men. He knew the horse.

Q. I will ask you if he didn't tell you that he never did know they were officers?

A. Henry said he didn't know they were marshals; that is just the way he said it.

Q. That he never knew they were marshals?

A. Yes, sir.

Q. That was in the same conversation that he told you about these other things; the same talk?

A. What others?

Q. That he told you about Wilson saying that he had a wife and children?

A. Yes, sir.

209 Cross-examination by the DISTRICT ATTORNEY:

Q. Was that at the same time, the same conversation, in which he told you that Wilson told him that he had a wife and children?

A. That was afterwards he told me—told me afterwards—that was after him and Wilson had the trouble.

Q. I know, but when was it that he told you that Wilson spoke to him about his family?

A. At the time that him and Wilson was having the trouble.

Q. I know, but when did he tell you about it?

A. After he came back, about 2 weeks I guess, may be not that long, and may be longer; I don't know.

Q. Where was it he told you that?

A. At Dodge's house, w'ere I was staying?

Q. Were you talking to him about the fight?

A. We were saying something about it; yes, sir.

Q. Was it in the conversation in which he used Wilson's language about the family that he told you that he did not know they were officers? Was that all, at the same time, that he told you that?

A. He just said it like this: he said he thought it was Billy Franklin or some of Arthur Dodge's men coming out on his horse; he didn't know it was marshals. That is the way he spoke it.

Q. Did he tell you that at the time he told you about the conversation Floyd had with him? Did he tell you both of these conversations at the same time?

210 Mr. CLAYTON (of counsel for defendant). Was it all in one talk?

The DISTRICT ATTORNEY. Was it all one talk that he told you all this now, or was it different talk that Henry had with you?

A. Yes, sir; we were talking about it there just in conversation.

Q. Now, what did he tell you in that conversation?

A. He said—the way he spoke it—he thought it was Billy Franklin coming out on Arthur Dodge's horse, or some of Arthur's men. He said he didn't know it was marshals.

Q. Now, did he not say if he had known they were marshals they never would have gotten as near him as they did; that they would never have gotten up to him?

A. I don't remember whether he said that or not.

Q. He knew Billy Franklin, did he not?

A. Yes, sir; he knew Billy Franklin.

Q. He knew the men who were around Dodge's, did he not?

A. I suppose he did. I don't know whether he did or not.

Q. Did you say that was in the same conversation that you had with Starr? You know what a conversation is, do you not?

A. Yes, sir; I think I do.

Q. Was it in that same conversation, now, he told you about him making the remark about his family, or did they occur at different times?

A. It all occurred, I think, about the same time. We were talking there.

Q. Was it the same time and the same place?

A. I won't say whether it was or not. I don't remember.

Q. You don't remember whether they occurred at the same time
211 or not?

A. No, sir.

Q. Why didn't you tell that this morning?

A. I wasn't asked about it.

Q. You were asked to tell the whole conversation you had with him?

A. It didn't come to my mind.

Q. Who refreshed your memory on the subject? Has anybody been talking to you besides the lawyers on the other side?

A. No, sir; nobody but some of the lawyers.

Q. Did they call your attention to it?

A. Yes, sir.

Q. They asked you if that wasn't so?

A. They asked me—yes; they did.

Q. They asked you if Starr didn't state that to you?

A. They asked me what Starr said, and I told them.

Q. We asked you that this morning, too, but you didn't tell this other.

A. Because I didn't remember about it.

Q. Who refreshed your memory about it?

A. I told you.

Q. Have you been talking to Mrs. Lipsey?

A. I have been talking to her, but not on that subject.

Q. Has she said anything to you about it?

A. No, sir.

Q. You are ready so st'te nobody has talked to you except the lawyers?

A. Yes, sir.

Q. His language to you was, that when he say him coming he thought he was who?

A. Henry said he thought it was Billy Franklin.

Q. When was it he thought it was Billy Franklin?

A. When he saw him coming out there; when he saw Wilson coming on the horse.

Q. That is when he said he thought it was Billy Franklin?

212 Q. He didn't think it was Billy Franklin when he got up to him, did he?

A. I don't think he did.

Q. Then it was when he was coming to him that he thought it was Billy Franklin?

A. Yes, sir; when Wilson started out. I guess Henry knew the horse, and he just thought it was Billy Franklin coming out on the prairie.

Q. That is what he meant when he said he didn't know they were marshals, is it not?

A. He said he never knew they were marshals.

Q. He thought it was Billy Franklin or some of the Dodge's?

A. Yes, sir.

Q. Now, I want to refresh your recollection; didn't he say to you, or did you not hear him say, that if he had known they were marshals they never would have gotten that close, but he thought it was Billy Franklin, or some of the men.

A. That is what he said; that he thought it was Billy Franklin or some of the men.

Q. And if he had known they were marshals he would not have got that close?

A. He said he didn't know they were marshals.

Q. Didn't he say if he had known it he wouldn't have gotten that close to him?

A. I don't remember of his saying that or not. I don't remember of his saying that.

Q. He said he never knew they were marshals?

A. Yes, sir; he said he never knew they were marshals.

Q. Have you stated all now?

A. I have stated all I know that I can think of.

213 Q. I want to refresh your memory on another point. In that same conversation didn't he tell you that when he shot Wilson the last time that Wilson was begging him not to shoot him? Now think about that?

A. He said not to kill him, "I am a man of a family."

Q. And if Starr didn't say, cursing him, that "you ought to be with your family?"

A. I don't know whether Starr cursed him or not.

Q. Starr told him that he ought to be with his family?

A. Yes, sir.

Q. And then he finished him?

A. Yes, sir.

Q. That is what Starr told you?

A. (No response.)

Witness excused.

214 Mrs. LIZZIE LIPSEY, having been duly sworn upon the behalf of defendant, was examined by Mr. W. H. H. Clayton, and testified as follows, to wit:

Question. You are the sister of Henry Starr?

Answer. Yes, sir.

Q. Did you know Floyd Wilson in your life time?

A. No, sir; I did not.

Q. I will ask you if you remember of one night, perhaps two nights, before the killing of Floyd Wilson, of Mr. Floyd Wilson and Mr. Dickey being at your house?

A. Yes, sir; I remember it.

Q. What time in the night did they come there?

A. Near about 4 o'clock.

Q. Did they come into your house?

A. They broke into my house.

Q. Who were they looking for?

A. Looking for my brother, I suppose.

Q. Henry Starr?

A. Yes, sir.

THE LAW ASSOCIATION —OF— PHILADELPHIA.

Q. Please state whether they informed you upon that night that they were officers?

A. They did not.

Q. That gave you no information of it?

A. No, sir.

Q. What time did they leave?

A. Well, they didn't stay there long.

Q. Was your husband there?

A. Yes, sir.

Q. Please state if either you or he asked them who they were?

A. Yes, sir.

Q. What reply was made?

A. He says to Wilson, "What is your name," and Wilson said "That is all right about my name."

215 Q. That was his answer?

A. Yes, sir.

Q. You say they never did inform you they were officers?

A. No, sir.

Q. What I want to ask you more particularly about is, from that time until the killing of Wilson was Henry at your house any more?

A. No, sir.

Q. Did you give me any information that these men were there looking for him?

A. No, sir.

Q. He never was at your place after that?

A. No, sir.

Q. He was not there that night?

A. No, sir.

Q. I mean after that until after the killing, of course I do not mean after that.

Cross-examination by the DISTRICT ATTORNEY:

Q. Where was Henry that night? Do you know?

A. No, sir; I do not know.

Q. How long had it been since he had been at your house?

A. I don't know exactly.

Q. Was he in the habit of coming to your house?

A. Not often.

Q. You were his sister, were you not?

A. Yes, sir.
Q. He staid around down there in that neighborhood, did he not?
A. In the neighborhood of where I lived?
Q. Yes, sir.
A. Sometimes he did, and sometimes he didn't.
Q. Who did he stay with when he was down there?
A. I don't know; different parties.
Q. Did he have any other relatives down there besides you?
A. No, sir.
216 Q. Why did he not stay with you when he was down there? You were his sister?
A. He was not in the habit of staying with me before he got into this trouble.
Q. What trouble do you speak of?
A. Into this affair that you are trying him for.
Q. This killing?
A. Yes, sir.
Q. Wher' was his home?
A. His home was with his mother when he was not at work.
Q. Wh're did he work?
A. In different places; McCall boys was one of the places.
Q. How far is that from your place?
A. Three or four miles.
Q. How far is Arthur Dodge's from your place?
A. About two miles and a half, I believe, is what they call it.
Q. How far is Beeche's from your place?
A. I guess that makes about a mile and a half, or maybe more; I don't know the exact distance, but that is the best of my knowledge.
Q. You say you never saw Henry after those marshals were at your house until after the killing?
A. I did not.
Q. How long after the killing?
A. Well, I don't know.
Q. About how long?
A. I don't know; I don't know what time Wilson was killed.
Q. Say he was killed two days after that, that he was at your house?
A. It was less than that.
Q. Say it was a day and a half?
A. Yes, sir; it was less than a day and a half.
Q. You saw him in less than a day and a half after that?
A. Yes, sir.
Q. Where was he then?
A. He passed my house.
217 Q. Did he stop?
A. He stopped, but he did not get off of his horse.
Q. Which way was he going then?
A. Going in a northerly direction.
Q. Do you know where he was going?
A. No, sir; I didn't know.
Q. Did you ask him?
A. No, sir.

Q. How long was it before he left that neighborhood there—left the Territory?

A. I don't know; I never saw my brother from the time that he passed my house until after Christmas.

Q. Where was he then?

A. He came to my house.

Q. How long was he there?

A. Not more than an hour.

Q. What time was it when he came?

A. He eat dinner with me; I believe it was New Year's eve, if I am not mistaken.

Q. Where did he go from there?

A. I don't know.

Q. Did you ask him?

A. No, sir.

Q. How long after that was it before you saw him again?

A. I don't know that I saw him but once after that until I saw him over here.

Q. Where did he go? Do you know of his leaving the country up there?

A. No, sir.

Q. You don't?

A. No, sir; I do not.

Q. Where was he during that time?

A. I don't know.

Q. Did you ever inquire?

A. Why, no; I did not inquire.

Q. You don't know where he was, then?

A. No, sir; I do not.

Q. Do you know whether your brother was at work at any time after January there, around there in the country anywhere?

A. I do not.

Q. Do you know where he was arrested?

218 A. I don't know; only from hearsay.

The COURT. Did he ever tell you where he was arrested?

A. No, sir.

The DISTRICT ATTORNEY. Did you ever ask him where he was arrested?

A. No, sir.

Q. Is he married?

A. I don't know.

Q. Did he ever tell you he was married?

A. I didn't ask him.

Q. How often have you seen him since he has been in jail?

A. Well, I don't know exactly the times without studying on it; I guess I could tell you the exact number by studying.

Q. About how many times; about half a dozen?

A. Why, I guess.

Q. Did he not tell you he was arrested in Colorado, and how they happened to arrest him?

A. No, sir; he did not.
Q. You never asked him about it?
A. No, sir.
Q. He never told you that he had his wife with him out there?
A. No, sir.
Q. He never told you anything about it?
A. He did not.
Q. And you never asked him?
A. No, sir; I did not.
Q. Did he tell any member of the family in your presence? Did he talk to any members of the family in your presence about that?
A. No; I don't believe he did. I have never been present when any members of the family spoke to him except my sister, and I am sure he didn't then. Well, I was on yesterday with my mother, but then we never talked about it.
Q. You never asked where he was arrested, or who was with him, or under what circumstances?
A. No, sir; all I know is newspaper accounts.
Q. You never asked him about it?
A. No, sir.
Witness excused.
Testimony closed.

219 This was all of the testimony introduced in the case. And then the counsel for the United States and the counsel for the defendant proceeded to argue to the jury the cause on their respective sides, and after argument of counsel the defendant moved the court to instruct the jury as follows, to wit:

(1) The court instructs the jury that although an officer, or one aiding an officer in making an arrest, may have the lawful authority to make the arrest, yet if such person or officer, in attempting to make the arrest, act in such a wanton and menacing manner as to threaten the accused with loss of life or some great bodily harm, to prevent which the accused fired and killed the person or officer, the killing would be justifiable.

(2) If the jury believe from the evidence in this case that Floyd Wilson, the deceased, had the lawful authority to make the arrest of defendant, yet if deceased, in making or attempting to make the arrest, acted in such a way as to endanger the life of the defendant or to threaten him with great bodily harm when the defendant was neither fleeing nor resisting the arrest, then the defendant would have the right to defend himself, even to the extent of taking the life of the deceased, if necessary.

(3) The court instructs the jury that if the defendant, being placed in a position in which his life is imperiled, slay an officer of whose official character he has no notice, this is homicide in self-defense if the killing was apparently necessary to save defendant's life, nor does it matter that the officer was legally seeking to arrest the defendant, the defendant having no notice of that fact. If the jury believe from the evidence that the defendant was placed in a position at the time of the killing in which his life was imperilled by the deceased, and he slew him without
220 having any notice of his official character, and the killing was apparently necessary to save defendant's life, then the killing of the

deceased was a homicide in self-defense, nor does it matter tha' the deceased was legally seeking to arrest the defendant if defendant had no notice of the fact.

(4) It is the duty of every citizen to submit peac'ably to a lawful arrest; but he is under no obligations to submit to an arrest unless he knows or is notified of the fact which justifies his arrest. Therefore, to make an arrest lawful it is necessary that the person arrested should have notice that he is arrested by lawful authority.

But the court overruled the said motion of the defendant and refused to give the aforesaid instructions as asked for by the defendant, to which action of the court in overruling the defendant's said motion and in refusing to give the instructions as asked for by the defendant the defendant at the time excepted.

The court then, without giving at all the first of the aforesaid instructions asked for by defendant, proceeded over the objections of the defendant to modify and enlarge the second, third, and fourth instructions aforesaid, as follows, to wit:

To the second instruction the court adds at the end thereof the following words:

"Provided the defendant was neither fleeing nor preparing to flee by standing the officer off by acts of threatened violence."

The second instruction is given as modified, thereby making the second instruction as given by the court read as follows:

"If the jury find from the evidence in this case that Floyd Wilson, the deceased, had lawful authority to make the arrest of the defend-
221 ant, yet that the deceased, in making it or attempting to make the arrest, acted in such a way as to endanger the life of the defendant or to threaten him with great bodily harm, that the defendant neither was fleeing or resisting arrest, then the defendant would have the right to defend himself, even to the extent of taking the life of the deceased, if it were necessary. Provided the defendant was neither fleeing nor preparing to flee by standing the officer off by acts of threatened violence."

The second instruction was given as modified. To the modifying of said instruction and giving it as modified the defendant at the time objected, but the court overruled the defendant's said objection, to which action of the court in refusing to sustain the defendant's said objection and in modifying the said instruction and giving it to the jury as so modified the defendant at the time excepted.

The court then proceeded to enlarge and modify the third instruction asked for by the defendant so as to make it read as follows:

"The court instructs the jury that if the defendant being placed in a position in which his life is imperilled, and slay an officer of whose official character he has no notice, *or had no reasonable ground to know his character*, this is homicide in self-defense if the killing was apparently necessary to save the defendant's life, nor does it matter if the officer was legally seeking to arrest the defendant, the defendant having *no notice of the facts or no reason to know what the purpose of the party was: Provided the defendant did not by his threatening and violent conduct prevent the officer from making his character and mission known. This is given in connection*
223 *with the principle I have given you, that if a man stands up and obstructs arrest, prevents arrest, armed with deadly weapons, and using them in a way that is threatening, then the officer has no time*

nor is he called upon to make proclamation. The officer can stand on the defensive and overcome the danger and take his man or overcome him by violence, if necessary.

"If the jury believe from the evidence that the defendant was placed in a condition at the time of the killing in which his life was imperilled by the deceased, and he slew him without having any notice of his official character, 'and the killing was apparently necessary to save his own life, then the killing of the deceased was homicide in self-defense; nor does it matter that the deceased was legally seeking to arrest the defendant if the defendant had no notice of the fact *or no reasonable grounds to know that he was an officer.*

"'*It is not necessary to know that it is Floyd Wilson, but an officer.*' '*But if the defendant prevented Floyd Wilson from giving notice of his character or mission by threatening and violent conduct, then of course he would not be required to give the notice. He can stand, as upon the other proposition, on the defensive.*' '*These propositions are given on the theory that if you believe that no proclamation was made. If a proclamation was made, then the defendant had express notice, he had positive notice, of it.*'"

The italics in the above third instruction indicate the addition and modification made by the court; and the court gave the said third instruction as above enlarged and modified.

224 To the giving of the said instruction so modified the defendant objected, but the court overruled the said objection of the defendant; and to the action of the court in so overruling the objection of the defendant and in giving the said third instruction as modified and enlarged the defendant at the time excepted. The court then modified and enlarged over the objections of the defendant the aforesaid fourth instruction asked for by the defendant, so as to make the said instruction read as follows:

"It is the duty of every citizen to submit peaceable to a lawful arrest, but he is under no obligation unless he knows or is notified of the facts which justify his arrest, 'provided he does not by his violent and threatening conduct prevent the officer from making known his character and mission, or he had no reasonable ground to know what his mission was. If a man has reasonable grounds to know a thing, then he must exercise the faculties that belong to him in order that he may have actual knowledge. If there are such reasonable facts offered to your mind as to produce certain conclusions, you as reasonable men arrive at that conclusion; that is exactly the duty that is incumbent upon every man.'

"Therefore, to make an arrest lawful it is necessary that the person arrested should have notice that he is arrested by lawful authority. 'Unless he have reasonable ground to know the condition, or did know it. The notice need not be given him at all if he knew the condition. This is provided he does not prevent the giving of such notice by his resistance or threatened violence.'

"These arec the propositions that are given in connection with the other part of the charge."

225 The said fourth instruction as above modified and enlarged was given by the court to the jury over the objections of the defendant; to the overruling of the defendant's said objection to the modification and giving of the above instruction the defendant at the time excepted.

The court then of its own motion instructed the jury as follows:

226 In the circuit court of the United States within and for the western district of Arkansas. August term, A. D. 1893.

THE UNITED STATES
vs.
HENRY STARR. } Murder.

Charge of the court.

Delivered October 18th, A. D. 1893; 3:30 o'clock p. m.

PARKER, J.:

Gentlemen of the jury, the defendant, Henry Starr, stands before you charged with the crime of murder for having on the 13th day of December, A. D. 1892, in the Cherokee Nation, taken the life of Floyd Wilson, a white man and not an Indian, by shooting him with a gun. It is further alleged in the indictment that the defendant did this act willfully and with malice aforethought, and if that be true beyond a reasonable doubt, it constitutes the crime of murder which you are trying. The things which enter into this indictment embrace the propositions necessary to be found by you from the testimony in this case, whether that testimony is all positive or of a circumstantial character, if it equals in proving power the testimony of one positive, credible, uncontradicted eye-witness, going to establish all of these material elements of this crime, then the crime is established, for it is then proven to the extent required by the law,
227 beyond a reasonable doubt. It will be necessary for me to take up sufficient time to present fully to you the principles of the law arising upon the propositions which have been invoked in this case, leaving to you to ascertain whether the propositions are found to be true or not; and then again leaving to you the application of the principle of the law to be applied to the proposition which you find to be established.

In order that we may see what it takes to make this crime it is necessary that we should take the charge apart; that we should examine the elements which enter into it; that we should see what things are to be established by the testimony here. After we have done that, have defined these elements, have told you what the law says they are, and what they mean in the law, we will then be called upon to go to the definition of the law of self defense, because that has been invoked here. The Government charges in this indictment that the defendant is guilty, and guilty of the crime of murder. The defendant asserts that he is guilty of nothing; that the law protects him; that he stood within the law, and within the protecting power when he took the life of Floyd Wilson. If that be true, according to the terms of the law, then he is entitled to this protecting power. If it be not true he stands without the pale of the protection of the law which may be thrown around a man under certain circumstances, and give him the right even as a private citizen to take human life. As I have said, it will be necessary to detain you sufficiently long to give you a proper understanding of the principles involved in this great law of self defense. It is doubly important in this case that we should

dwell upon that proposition, first, because it has been invoked by
228 the defendant; and, secondly, because you are to understand that it is not a law that belongs to one individual alone. You are to see to it whether this vital, living sign of this great protecting ægis, called the law of this goodly land, in the shape of this officer, under the circumstances and facts in this case was entitled to the protecting power of the law of self defense, because if he was in the right in the execution of his duty, if he was performing that which I did not command him as judge of this court to perform, but which the Chief Executive officer of this Nation—whose headquarters are at the capital of the country—commanded him as one of his subordinates to do—if he was right in the method he adopted in doing it, then he is surrounded by the whole power of the law of self-defense. It then becomes doubly necessary that we should look at the provisions of this law. After we have done that it will become necessary, because of the attitude of this case, to ascertain what under the law are the rights of officers in the execution of their duty, and what are their duties, as well as considering at the same time the rights and duties of citizens in this country with relation to the law of arrest that may be sought to be exercised upon them. All of these propositions we must examine. We must dwell upon them sufficiently long to understand them accurately and clearly. We must not only dwell upon these propositions, but we must then call your attention to the different kinds of testimony, the different kinds of evidence that you may invoke in this case in order to enlighten your minds to enable you to know what the truth of it is, because it is the solemn, sacred truth you are to be governed by in your arbitrament of this case—the different kinds of evidence I say
229 that you may invoke in order to sustain or overcome one theory or the other of the case, whether it be positive evidence to be relied upon, or circumstantial testimony to be depended upon to illustrate and exemplify the true state of case. Then it will be my duty to call your attention to the rules of the law given to you as directory rules to be applied to enable you to weigh the credibility of the evidence of the witnesses who appear before you. Then it will be my duty to define to you the extent to which the case must be proven to authorize you to find the defendant guilty.

Let us then proceed first to see what enters into this charge. The very first proposition required to be established in order to give the court jurisdiction to try it, in order to give you the right to pass upon the merits of the case, is that Floyd Wilson was a white man and not an Indian. That is an allegation put in the indictment because, under the law conferring jurisdiction upon this court it has no right to try a case of homicide, a case of alleged murder, if committed by one Indian upon another, but if committed by one Indian upon a citizen of the United States, who is a jurisdictional citizen of the United States as was Floyd Wilson, the deceased, according to the proof here, then you have a right to sit in judgment and determine the case upon its merits. That then is the first proposition to be found. The second one you are to ascertain the establishment of is whether or not Floyd Wilson is dead, because a man must be dead before anybody can be convicted of being his murderer. Third, that he died by violence of the kind named in the indictment, or violence of a kindred nature—that is to say, that he died because he received

a wound, or wounds, from a gun or pistol; either one will do. It
230 is alleged in the indictment that he was killed by being shot to death with a gun. If the wound that actually caused his death was produced by a pistol, it would yet be responsive to the allegation in the indictment that it was caused by a gun, because they are weapons of like character. They are both pistols and guns in the law; they are all weapons of the same family; they are all of the same generic kind; they all produce like results; they are all operated in the same way. The fourth proposition necessary to be established is, that this wound which caused the death of Floyd Wilson was produced by the act of the defendant, that is, that he shot Wilson, and that his shot killed him. Now, the court says to you that as far as these propositions are concerned there is no controversy in regard to them. The very nature of the defense of this defendant impliedly admits that Floyd Wilson is dead; that he died by violence of the character named in the indictment, and that the defendant inflicted that violence upon him. You may consequently put aside these propositions as established, as proven in the case, propositions necessary to be proven and established, because the very nature of the defense is a confession and an avoidance, a confession of the killing of the man alleged to be killed, and an effort to avoid it by the invocation of the right to do it, which admits that he did do it. But whether that is true or not, you have the evidence of the fact of the dead body of the man being seen; you have the fact of these wounds being inflicted upon him; you have the fact of his apparent condition of health before he received these wounds; you have the fact that he died at the place where the wounds were
231 received; that in the graphic language of one witness, the deceased was drawing his last breath when he reached him—he was dying. You may take that as establishing these propositions.

We are now approaching the very pith, the very marrow of this charge, the very substance of it, because the fact of a man being dead, that he died by violence, that he died at the hands of a certain party, does not yet prove a crime. There are certain other elements which enter into that act which must be taken into consideration by you to enable you to characterise the killing, to say whether, under the law I am about to give you defining this crime, or the elements entering into it, it possesses these attributes that make up the crime of murder—the highest crime, practically, known to the law of this country—the crime that is, practically, of the most serious import known to the laws of this country, a crime which takes away the support of a family, which robs the innocent individual citizen of that which he has no right to be robbed of, and that which he does not forfeit under the law except by his own conduct, and when the law says he shall forfeit it. It is necessary, therefore, when we come to a subject of this grave importance that we should note with care, and that we should understand with accuracy, that we should discern with precision, and entire correctness, the exact meaning of these expressions that enter into this crime of murder. Now, in order that you may understand them I shall take up sufficient of your time, though it may be tedious, though it may weary you, to enable the different minds of the twelve men who make up this jury to receive these propositions understandingly, for we must bear in mind that when twelve minds are to act, when
232 they are to be focalized upon a given point, it may be a better plan to reach them by different expressions meaning the same

thing; it may be the better plan at the expense of being considered as repeating to not pass by too hastily those definitions, but to give them in such a manner as that you can make no mistake about them, and to give in connection with the definitions such illustrations as will bring them home to your minds, and fasten them upon your convictions. First, we are to ascertain whether or not this killing was done willfully. You will find after I have defined that term that this is a thing which is not very difficult to understand; it is one of the propositions that you pass upon in viewing the every day occurrences of life. We arrive at a conclusion as to whether an act is willful or not almost unconsciously; we do it with such ease, and so often, that, I repeat, you will find but little difficulty in coming to the conclusion as to whether it was a willful act or not after I have given you the definition the law gives of what is willful in a case of homicide. We are required now, at this state of the proceedings, to find out whether this defendant with this gun or pistol, as the case may be, willfully took the life of Floyd Wilson. If he did, that is one element of the crime of murder—not the distinguishing trait, however; it is not the peculiar characteristic of that crime; there is something else which goes to make the crime of murder besides the doing of an act willfully, for if a man kills another under the law of self-defense he does the killing willfully. If he kills him in such a way as to make the killing voluntary manslaughter he does it willfully. But when we come to the other characteristic it is then we reach that which is the distinguishing trait;
233 it is then that we get to the very vitals of a state of case of that kind, of the dark and bloody deed which makes murder. It is called and known to the law as malice aforethought. First, we will define the expression "willfully." In doing so we shall read from the charge delivered in the case of the United States versus Famous Smith, who was tried for murder in this court at the last term. The definition is the same in all these cases. The law fastens a definition to a certain condition, to a certain state of case, and it is for us to take that definition and see whether it is applicable to the facts here.

"If the defendant in this case did the act of shooting willfully, and with malice aforethought, because of the intimate connection between the act of that kind and the result called death, the law says that he produced the death willfully and with malice aforethought."

We first, then, proceed to find whether he did the act willfully. Now, this might be defined very shortly by my telling you that if he presented a gun at Floyd Wilson, or the pistol which took his life, and he made that presentation intentionally, and he pulled the trigger intentionally, that he did an act which the law calls willful, because intentionally in law means willfully, and willfully means intentionally, and so when a man does an act intentionally he does it willfully. Now, we might go further in that connection here, and if we are able to find from the circumstances of the case, because now we have already reached a proposition that we can find only by the kind of evidence known as circumstancial—the condition of the mind of the defendant at the time of doing the act—we
234 cannot fathom that mind by any positive means at our command. We can use positive facts to establish other ciecumstances. We can take these circumstances, and from them as reasonable men of common observation, men of mature judgment, men who have witnessed the affairs of other

men in life—we can take these circumstances and by the laws of logic, by the laws of the land, we are permitted to find out the existing condition of the mind from these things. For example, we take a gun; we know that it is a dangerous and deadly weapon; we know that it is made for the purpose of taking life; it is constructed that way, but we know at the same time it is an inanimate object; it is a mere automaton; it will not exert itself; there has to be some intelligent power exerted upon it to produce a deadly result. When we see a man, therefore, draw a gun and present it at another, we at once infer as reasonable men that that act is one prompted by the intelligence of the mind of that party, because it could not do it itself; it could not put itself in that position. We go further, and we see that transpire which produces a terrible deadly result, the firing of the gun or pistol; we know that did not occur of itself; we know it is constructed to have operated upon it an intelligent power, and from the thing being operated upon, from the effect in that case we are authorized to reason back to the cause, the condition of the mind, and in that way find it.

Now, that is the way you do find it. You see a man in the road, or in the street, fire at another; that other falls dead; you conclude that the act of firing is intentional from the way he does it; you conclude that he intended to fire. You go further than that; you know that that
235 act of firing is usually or probably or naturally a deadly act, and, consequently, because you recognize the known connection between the act and the result you find that the result was intentional, because you know that every man is held by the law to have intended the necessary, or natural or probable consequences of the act he does. If he does an act that may naturally or reasonably produce death, the law says he is held to have intended death, and if he is held to have intended death he wills it, because willful means intentional and intentional means willful. Now, that is what is meant, in short, by a man's killing another intentionally. He presents the gun at him, and he fires it at him within shooting distance; the man is killed; you have the facts which ordinarily and usually convince reasonable men that he intended to kill; that he intended to take life. He is not permitted by the law to forget that proposition, because there is flowing in the estimation of the law naturally, reasonably and probably from his act a deadly result, a deadly consequence which the law holds him to have intended.

Now then, in short, how would you find that he did the act intentionally? You would go to the facts and circumstances, as a matter of course, and you would see if the act was of the character which produced death, because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, and the party is said to have intended the result and to have willed it. Intent is something which can be found only by inference; by circumstances. These things that I have used in this illustration are only circumstances. You see a man draw a gun, and you see him present it at another; you see him fire
it at him; that is not a mental condition, but it is the evidence of
236 one. It is a thing which stands around that condition. It is called in the Latin *circum star*, which means "standing around." It goes to characterise the condition of the mind, and it goes to enable intelligent minds to know what the party contemplated, what he intended when he was doing that act, and that contemplation and intention can be found only

from circumstances—that is, by the nature of the act done, and the way it was done and the character of the weapon used, as I have told you, bearing in mind that the law holds every man to know the nature of the weapon that he used, the purposes for which it is constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion. For that reason, when a man presents a gun or a pistol at another, and shoots it at him, the law says that he intends to kill him, because the killing is a result that is natural, or probable or reasonable.

You then go to what you would go as reasonable men outside of the jury box to find a conclusion when you are searching for one here. And if these facts that I have enumerated are of a character to convince you as reasonable men that the act as done by the defendant in shooting at Wilson was intentional, then you are necessarily compelled under your oaths to find that the act was willful, and not only that, but if the act produced the death of Floyd Wilson these circumstances all going to show the intentional or willful doing of the act existing, you are called upon to find that he intended to take the life of Floyd Wilson, because, as I have already told you, of the known connection between a deadly act of that character and the result called death, because it usually, or probably, or
237 naturally may produce death, and whatever may spring from that act as a natural, or probable, or reasonable, or usual result we are held to have intended by the law. Then, upon that proposition, go to the evidence here as to how the defendant held his gun; see what he did with it; look at the very result produced by it; look at the character and number of wounds upon the person of the man killed. You are called upon to do that in coming to the conclusion as to whether this proposition is established or not. But you are to find not only whether this act was willful; you are to ascertain as a second proposition whether in the law it was done with malice aforethought, and you have a right to take these wounds, their number, their position, the time they were inflicted, the circumstances under which they were inflicted, and all the other facts and circumstances into consideration to enable you to characterise this act, to see whether it was done willfully or not, and whether or not it was done with malice aforethought.

Then I ask upon the first proposition that you take into account all of these facts and circumstances to enable you to see whether or not the defendant intentionally, and consequently willfully killed Floyd Wilson. If he shot at him, if that shot produced his death, if that shot was intentional, as I have already reminded you, and you believe it beyond a reasonable doubt, then he willfully and intentionally killed him, and you may put that proposition aside as established.

Now, we come to a second condition defining what it takes to characterize or distinguish murder from other homicides. I say to you, that if under the proposition of the law that you will receive in this case,
238 you are satisfied that this killing was done willfully, and I want you to note the terms I am about to use—done willfully, and done in such a way as not to be justified under the law of self-defense, and done in such a way as that there are no mitigating facts in it to reduce the grade of the crime, if the evidence shows that it was done willfully, and done

without justifiable cause, or in the absence of mitigating facts, the law says it was done with malice aforethought, and the establishment of the proposition that it was done wilfully, and the banishment from the case of the other proposition that it was not done under the law of self-defense, or that it was not mitigated under the law so as to reduce the grade of it, leaves the killing in the condition where malice aforethought springs into existence from the party's having done the wilful act. There are but three conditions growing out of homicide, under American law—I do not mean the law of the States, I mean the law of the United States. One is a condition where murder exists, and the other is a condition where the act is no crime at all, because excuseable under the law of self-defense, and the other is a condition where the crime is of less grade, and where the killing is not characterized by wickedness, brutality, or savagery, and is called manslaughter. If the condition which is known as a condition of self-defense does not exist in the case, and if the condition which is known as a condition of manslaughter does not exist in the case, the only sensible conclusion we can arrive at by eliminating these two propositions from the legal equation is to find that there is the only remaining proposition in it, and that is the proposition known as murder; and I repeat again,
239 that if the evidence shows that it was done wilfully, that if the shooting was intentionally done, and not done under the law of self-defense, and not done in such a way as to give the party a right to claim that it was an act, that was manslaughter; if none of these conditions exist you would be authorized to find from the fact that it was done wilfully, that it was done with malice aforethought; and when I give you the definition of that expression in its varied forms, as I will give it to you, you will understand the proposition I have already asserted to you.

Malice aforethought is defined by the law in a general way to be the doing of a wrongful act without just cause or excuse in such a way and under such circumstances as to show that it was done wrongfully, and that it was done in the absence of that which would give the party a right to defend against it, the right to do it upon the ground of self-defense, or that it was done in the absence of mitigating circumstances. Again, the law defines it as the doing of a wrongful act without just cause or excuse, and in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent on mischief.

Now, let us see what that means. It is a very beautiful definition to the lawyer, to the man of legal mind and legal training it is very comprehensive to him; but to the layman, a man though he may be of equal intelligence, but not perhaps so well skilled in the technical definitions of the law, it would not be so easily understood, unless we would explain it a little further. The doing of a wrongful act without just cause or excuse, and in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent on mischief. You will understand that this terrible characteristic of the crime of murder known as malice aforethought arises from two conditions: First, if a man has a special hatred
240 or a violent animosity against you, or he has an old grudge which he wants to satisfy by shedding your blood, he wants to wipe out a feud that exists between you and he, and he kills because of that special relation that exists between you, the law says there springs from the

doing of the act for that cause malice aforethought only; no other characterization can be given to a killing of that kind. When a man contemplates either directly or indirectly a purpose to slay another if occasion offers, if opportunity arises, whether because of a special spite, whether because of that peculiar animosity, or whether because of general hatred or general animosity against the representative of the law called an officer, or against officers, he prepares himself for a deadly conflict to execute a purpose of that kind, entertaining this feeling of bitterness, this hatred, this animosity, and he takes a human life because of it, then he takes it because of a special condition of mind against a class of persons, and malice aforethought exists there. But malice aforethought may exist as a characteristic quality of the crime of murder without either one of these special conditions.

You understand that we are situated in society in such a way as that we owe certain great duties to each other. There are belonging to us certain great rights. The rights are correlative with the duties; one is mutually dependent upon the other. The right to life, for example, as belonging to each individual innocent citizen, depends upon the way he and other citizens perform their duties towards each other. We enter that society with what are called natural rights. We do not surrender them; society recognizes them as fully belonging to us. The highest of them belonging to us, and that continues to belong to us as long as we live an innocent life, until we have forfeited it by our own conduct, is the right to life. You
241 recognize the force of that. Every man recognizes the full power of that expression. It is the most sacred right that he has, and therefore it is not to be taken lightly; it is not to be destroyed in an unwarranted or unlawful way, and if a man so far forgets the social duty that rests upon him not to destroy wantonly, wickedly, and maliciously, human life, but to protect it, as to destroy it, when he so far forgets his obligation to his neighbor, when he so far obliterates from his mind the golden precept which enjoins him to do unto others as he would have others to do unto him, as to wantonly and wickedly destroy human life, then the act as done by him in that way shows he has a heart void of this social duty and a mind fatally bent on mischief. He has forgotten his obligations to the community—he may kill a member of that community whom he never saw before, and he consequently could not have any special animosity against him as an individual—but if he killed him wilfully, if he killed him without the state of case that he could invoke that would give him the right to stand upon the law of self-defense, or if he killed him in such a way as that he could not invoke this more merciful provision of the law, which looks at the infirmities of men under certain circumstances, and takes compassion upon them, and fastens to their act of killing the crime of less grade than that of murder, named manslaughter, he would be guilty of murder. If he kills him wantonly and wickedly, if he shows that he has a heart void of this social obligation, then he has forgotten his duty to the community, and the fact of his doing an act in that way shows that he had a heart void of social duty, and a mind bent on mischief; and you see by looking at our relation in life to each other, our duties to each other, our obligations to each other, that we at once discover
242 at once the object and power and the full meaning of this expression which says that when a man kills another in such a way as to

show that he had a heart void of social duty and a mind fatally bent on mischief, that he does it with malice aforethought, whether he does it because of special spite against the individual person, or whether he does it because of a spirit of defiance to the class of persons who might have a right to exercise authority upon him under certain circumstances, or whether his act of killing springs into existence because of a state of general hatred of mankind, or general malevolence, or general recklessness of human life—in either case you have this definition filled to the uttermost part of it, and you have a definition which is full and comprehensive placed before you so that you can understand it, so that you can make an application of it, if the facts in the case warrant that application. We now proceed further, repeating the different forms of the definitions of the law defining this characteristic of the crime of murder in order that you may make no mistake in your application of it. It is a condition of the mind; it is something which exists in the mind, and whenever there is a thing which exists in the mind which is necessary to be found to make up the elements of a case, because we can not get into that mind to know that is going on there at a given time, because we could not tell what was transpiring there if we could get into it, we must learn it in some other way; there must be some rational way by which we must learn it; some way that rational men would adopt, because we are not authorized to adopt any other method than that which is reasonable in arriving at conclusions.

We are situated here as reasonable men; we are to take the facts that
243 have come to us, and we are to bring to bear upon these facts the reason that we have, that characteristic of the mind which enables us to remember the facts first, and then to weigh them and see what they are worth. We act in the same way, I say, as reasonable men would act, and adopt what they would adopt under a given state of case. And there is a reasonable way, and that is the way that the law recognizes as a proper way by which men may arrive at conclusions. It is from the nature of the transaction, the nature of what takes place, the character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration to see what the nature of the thing done was, whether it was an innocent or criminal act, and if it was a criminal act, what was the nature of that criminal act. Now, going back to this definition again, the law says that malice aforethought is the grand criterion which distinguishes murder from other homicide. And it is not so properly spite or malevolence to the deceased in particular as any evil design in general; the dictate of a wicked, depraved, and malignant heart; a purpose to do a wicked act.

"A man may kill another because he has got some animosity against him, but in looking for the character of the motive or animosity you need never expect to find that it was in proportion to the act done, because you will never find it. Men sometimes kill for the most trifling insults, or the most trifling indignities, and sometimes that indignity is only imaginary, while other men, who have been under moral restraint, who are obedient to the law of the land, who have been so trained that they take a proper view of their duty to their fellow men, would not even be insulted by such a thing. A man, I say, may kill because of these,
244 or he may kill from what the law calls general malevolence, because he is reckless of life, because he does not care whether his fellow

men live or die. That often transpires where a man who is an entire stranger to another shoots him down; kills him in cold blood; shoots him down in a way that we would infer from the act that it was done in such a way as that it was murder. Nobody would hesitate for a moment to find that he committed murder. How do we conclude that? It is exactly like the condition we would come to if we knew an act of shooting without good cause was done by a lawless or desperate man, when he fired his pistol at another when he had no cause, and we would come to that conclusion almost instinctively from the character of the act done and the way he did it, and the very motivelessness of the act; the very fact that the party had done nothing to even excite him or even aggravate him. The law recognizes that an act of that kind is evidence of a wicked, depraved, and malignant heart; it arise from a general purpose that a party may entertain to do a wicked act that may result in death. And if a man kills another suddenly, without any or without a considerable provocation, the law implies malice; for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause.

"Malice is an intention to do bodily harm, a formed design to do mischief. It has also been defined as a deliberate intent to kill. A man forms a design to do bodily harm that may result in death, and he executes that design and does produce death. That is a case that has malice aforethought attached to it, because he has no right to form a design of that kind and execute it. He does not form a design of that kind when he stands upon the defensive. The motive that prompts him then
245 is to defend himself, but when he contemplates a purpose to take another's life without its being necessary to defend himself he can not set up anything even in mitigation of an act of that kind, because this element of murder known as malice aforethought exists which grows out of a state of premeditation, a state of case where he thinks of it before hand, and if he thinks of killing before hand and kills in such a way as that the act of killing can not be mitigated or justified; the fact that he thought of it beforehand, the fact that he prepared to do it beforehand, shows that it was done deliberately; that it was done with premeditation, and it consequently grew out of a wicked condition of mind, the mind that entertained a purpose to produce a deadly result without just cause or excuse or in the absence of mitigating circumstances.

"When a man forms a deliberate intent to kill another, that is a malicious killing." "It does not necessarily import any especial malevolence towards the individual slain, for it also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief. It imports premeditation. Therefore, there must logically be a period of prior consideration"—that is, prior consideration of the purpose to do the act which produced death—"but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as do the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision."

You remember the anecdote that is published by Miss Martineau
246 of the English admiral who went down in a storm at sea, and who sank and came up in the ocean three times, and who was caught

the last time as he came up and he told her, in giving his experience, that during that brief period—it could not have been but a few seconds—that every event from his earliest boyhood recollection passed in review before his mind. I state this to show you how rapid the human mind can act. And in this age, an age when we have weapons of destruction brought to such perfection that in the twinkling of an eye the heart's blood is let out; that in the twinkling of an eye a thought to destroy human life is conceived and executed—I say, in this age, when we have such elements of destruction and when so many men have forfeited their innocent lives because of the reckless and wicked use of these elements of death and destruction to life, because of the ease with which they can be used and the rapidity with which the deadly, hissing, burning missile can reach the vitals of its victim, it is important for us to note this fact, that the human mind is capable of such rapidity of thought that it may conceive a deadly purpose, and then and there cotemporaneously, apparently, and practically with the conception of it may execute it; and yet when that is done, if the conception of the purpose to kill was without justifiable cause, or in the absence of mitigating facts, it is premeditated in the law; it is thought of beforehand. The deadly purpose is first conceived, as it must always be, because the arm will not do a thing of that kind unless the mind commands it. The mind commands its being done; it formulates the purpose before ever the trigger is pulled by the finger; it formulates the purpose before the deadly weapon is put in deadly position. The deadly purpose, if the party executes it, is in existence, I say, before
247 that deadly weapon is put in position to execute the deadly design; and that is an important fact that may become necessary to note in this case, because when we get further on it will be necessary to see whether under the law this defendant at the time that the officer approached him, at the time that the officer presented his weapon upon him, at the time the officer fired upon him, was doing that which in the law would give that officer the right to do as he did, because he was making a violent demonstration indicative of a deadly purpose to slay that officer to prevent his executing the command in his hand. It is an important legal principle that we are to note here. It is an important fact connected with the ability of the human mind that we are to note in passing here, because when we get beyond this definition, when we get through with that, we then come to this great principle of the law of self-defense. We are necessarily compelled to look at the relation of these parties to each other, and see what their respective rights were under the law. If the officer was in the right, if he was doing what he had a right to do, and this defendant at that time concieved a deadly purpose, though it was not yet executed, the officer, because he had the bare conception of the purpose in his mind, of course could not proceed to violence; but if the defendant proceeded in a violent way to execute it, then we are to look at the execution of it to see what the condition of the mind of the defendant was to see whether he had in view a deadly purpose, a deadly design, against this officer, bearing in mind that, though the law requires premeditation, the thought to kill must be contemplated beforehand, yet the contemplation of it may be cotemporaneous with the execution of that thought.

248 "Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human

mind can form a deliberate purpose to do an act, and if the intent to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice.

"Malice is an intent of the mind and heart, the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act or which produces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, and in the absence of mitigating circumstances, which produces death, it is murder, whether it grows out of special spite or animosity, or a specific design to take life, or the purpose to do some other act of a wicked and malicious and criminal nature, which because of its nature and the way it is done a human life is taken, malice aforethought exists, because that is the doing of a wrongful act or excuse which results in murder. It evinces a formed design to do such mischief as may deprive a fellow being of life."

For example, having reference to the latter part of the sentence I have just given you, if this defendant formed a design to resist the execution of legal process upon him, he had in contemplation a purpose to resist it by armed violence if occasion offered, and occasion did present itself, and in the execution of this purpose, of this previously formed design to resist the execution in a proper way of this process, of this warrant, and took the life of Floyd Wilson, then he is in the attitude of doing a
249 wrongful and unlawful act, and by executing it he takes a human life; and when he does that wrongful act in that way, in that illegal and improper way, as you may see it after you have heard the law defining the rights and duties of officers and citizens, and he contemplated a purpose to do that, and he was going about the country armed for the purpose of resisting arrest that was to be properly executed upon him, and then he takes a life in pursuance of a previously formed design to do an act which may produce a deadly result, the law says that there is a crime. It says that if men form an intention of doing such a thing, and they seek to do it, and in the execution of it they take a human life, they may have had no specific design to kill; but if they had a design to do these other things that I will name presently, and in the doing of these unlawful things they took a human life, the law says it is murder.

Now, what sort of things are they, the crimes that from their nature and the way they are executed may produce death? You take, for instance, certain crimes connected with property. You take the crime of burglary. If a man is entering your house, and you can not get rid of him in any other reasonable way than by killing him, you have a right to shoot him down. Why? It is not because you are to weigh in the balance the property that he may steal in your house against his life, worthless though it may be, and criminal though it may be, for you can not do that. You would not say that, because you would not hang a man for the crime of robbing your house, but I will tell you why it is. The law has philosophy connected with it, and when we understand its philosophy we can the bet-
ter apply it, and we feel that we are doing our duty to a greater
250 extent when we do apply the law, when we do enforce it, when we understand it, and its wisdom. In that case you kill because it is a crime, which, from its nature and the way it is executed, jeopardizes life; it is because you are permitted to weigh a human life against another life and, especially in your case, an innocent life against a criminal life.

That is the reason of it. You take the crime of robbery; it is a crime that from the way it is executed it jeopardizes life. If he who is committing it proceeds according to the code of the robber, according to the recognized code of the robber's profession, and demands your money or your life, meaning that he will take one if he does not get the other, it jeopardises life; it is violence to the person committed in the presence of the party by putting him in fear, and the law says you can kill the robber upon the spot, not because you can weigh your pocketbook, or purse, or your watch in the balance against his worthless life, but because the act is one that indirectly endangers life. It is the same way with the crime of arson. A man sets fire it may be to your stable, and that fire will probably catch your house, and burn you and your family; it endangers life, and for that reason if you catch a man committing arson you can kill him. If a man enters upon the purpose of resisting the execution of legal proces', sought to be executed in a legal way, he enters upon the doing of that which may cause the destruction of human life, because, as I will show you further on, at that stage of the proceedings of that character the officer has belonging to him certain great rights—yea, I will clas'ify them more correctly. There is devolving upon *him*, embodied in this great command that I will read to you presently, great duties, and a human
251 life may be destroyed by his failure to observe them, and when a purpose is formulated to resist arrest that may be sought to be executed in a legal way, and the party prepares himself for that by arming himself with a Winchester and a pistol, marching about the country preparing for the onset, if the occasion offer, and because of that he takes the life of the officer, he is then committing an act which results in death growing out of a premeditated purpose to do an act which indirectly endangers life, and because of that he would be guilty of murder, though he might not have any specific intent against the officer other than to resist by violence the legal execution of legal process by him. It is therefore necessary that you should note this passage which I have given you.

If he contemplates a purpose to do a wicked, malignant, and criminal act, which because of its nature and the way it is done a human life is taken, malice aforethought exists, because that is the doing of a wrongful act without just cause or excuse which jeopardises human life, and which results in death. It, in other words, evinces a formed design to do such mischief as may deprive a fellow-being of life. Malice is an intent of the mind and heart, the law says. As I have already told you, we can never have presented to us direct evidence of what was the intent of the man's heart at the time. You can not tell the condition of *them* mind by direct proof, bearing in mind the distinction between these two kinds of evidence, positive or direct proof and circumstantial evidence. Positive or direct proof is proof which shows the existence of the very thing
252 itself that you are hunting for. The very thing you are hunting for is the condition of the mind. You can not have that condition placed before you by positive evidence—that is, by the statements of people who saw the condition of that mind. It is not capable of being seen. Therefore, if you are to know it at all you must know it in some other way; you must get at it, in other words, by the light of circumstances; you must know it by the means of things standing around the act done, which go to characterise the act, which go to show the condition

of the mind, which prompted that act, which brought it into existence. This is the usual way of getting at it, and it is a reasonable way, because it is the way that reasonable men adopt; it is the way that you may adopt when you are sitting in a jury box, and are called upon to find the mental condition at a given time, as you are called upon to find the mental condition of this defendant at the time of the killing. You are required to find, in other words, whether or not the mind of the defendant in the light of the law I have given you defining this characteristic of murder known as malice aforethought, was characterised by that condition, or that the act he did was done willfully and done with malice aforethought. Malice is to be inferred from the attendant circumstances surrounding the transaction, and the jury have a right and it is their duty to look at these attendant circumstances to what character of act it was, to see what was the condition of the mind of the party at the time the act was done. Anything that shows deliberation, anything that shows premeditation, a premeditated purpose to do a wicked or wilful act that might result in death, is a fact that may be considered by the jury going to show the
253 existence of malice aforethought.

For instance, the law lays it down as a principle, if premeditation is shown, if the purpose to kill without just cause directly existed in the mind of the party who killed, or the purpose to do a willful or unlawful act that might result in death is shown by the action or the party to have had a previous existence, an existence prior to the time of the killing, that shows the existence of malice aforethought. Therefore, there is an absence from the case of that state of facts which goes to show that the party had a right to do what he did do. The law lays it down that the deliberate selection and wrongful and unlawful use of a deadly weapon shows premeditation, shows that the act was thought of beforehand, and whenever a party, entering upon what unlawful or criminal enterprise he may enter upon, prepares himself with a deadly weapon for the purpose of using it in a wicked or unlawful way, the fact of the preparing the weapon and selecting it for use in that unlawful and wicked way, in a way not authorized by law, in a way that the law would not mitigate the act if done—I say, the fact of the selection and preparation of a deadly weapon, and the use of it in an unlawful and deadly way, after he had so selected it and prepared it, shows the existence of a state of premeditation, shows that he thought of the purpose to kill wrongfully and unlawfully before he executed it, and when that state of case exists there is a condition of malice aforethought, which goes to characterise the act as done. It shows the purpose to do a wrongful act without just cause or excuse. You may go to the killing. You ascertain how the killing was produced; you ascertain the character of the weapon used; you find out whether it was
254 deliberately, wilfully, and unlawfully used at the time. You find out whether it was used under such circumstances, or in such a way as that he did not have the right under the law to use it, or that he would not have a right under the law to ask that the result produced by the use of it be classified as a result of less criminality than murder; and whenever you find that he wilfully and intentionally selected and used a deadly weapon under such circumstances you necessarily find that the killing was a murder.

I have now undertaken to give you the definition of both of these expressions which enter into this crime, and I have told you that you can only find these characteristics of these crimes by the light of circumstances. Now, because of prejudice, or undue bias, or anything of the kind against that kind of evidence that some men may entertain, and say they will not find them at all because they can not find them by positive testimony, thereby commanding the wheels of justice to stand still, close the temples of justice, destroy their altars, and invite into the field of action where before men of law-abiding dispositions would seek protection by the law, the lawless man, the desperado, who of course would always have the advantage in such a condition. But you are not unreasonable men; you are reasonable men. You are therefore to find these character'-tics in the way that reasonable men find them, by the light of the circumstances surrounding the transaction, taking into account that which lead up to it, taking into account the position of the parties at the time; what their mission was; what their business was there; what their object was—taking into account, as I told you, all these things,
255 and considering them in finding whether it was done wilfully.

Look at the manner of the shooting, the time of the shooting, the very nature of the wounds, and their very number, and under what circumstances they were inflicted. It is only by the light of these things that we are able to fathom the human mind and to correctly denominate its condition. You must do that. You must name the condition of it. You must be able to say, first, whether this killing was done wilfully, and secondly, whether it was done with malice aforethought. I hope, by repeating these expressions in different forms, and by illustration, I have enabled you to understand exactly what is meant by them so you may see whether they exist in this case, whether they go to characterize the act of the defendant in taking the life of Floyd Wilson. The Government says they did; that they did have an existence; that they did characterise it. The defendant says they did not; that he did exactly what he had a right to do. There is a sharp contrast between these two positions; there is a wide distance between them; one is right, and the other is wrong. One is an innocent act, and the other is the highest crime practically known to the law. You are called upon in the solemn discharge of your duty to lay hold of every circumstance, of every fact, that may illustrate or may throw light upon this transaction to enable you as honest, intelligent, fair-minded and impartial men to say whether in this case the law has been violated by the defendant committing murder when he took the life of Floyd Wilson. If so, your duty, as you know, is plain, because your sworn duty as jurors is to uphold the law, because the great duty of all of us
256 as citizens is to uphold the law in its majesty and power. Self-interest prompts us to do it, if nothing else would. The fact that we love to sleep in quietude, and in protection, beneath our rooftree, in the presence of our own family altar, in the nighttime, commands us to uphold this mighty power which walks in grandeur and majesty throughout this land and surrounds every house, and says to every assassian, to every burglar, to every murderer, "Thus far and no farther." It is a great and mighty power, and for the maintenance of which governments are instituted. This mighty power that so protects all the innocent is but the will of this great people, their expression in legal form, prescribing a rule of

action binding upon all, commanding the respect of all, and beneath it all must bow, and in this Government of the people and by the people the law is the mandate to which we bow; the law is the supreme ruler. You, then, in this case must solemnly, deliberately, and dispassionately and reasonably look at these facts to see whether the power and majesty and dignity of this mighty protecting agency has been trampled upon ruthlessly and wickedly and with malice aforethought by this defendant, by means of which act a man has been robbed of his life, if that be the true condition. Then take these facts and these circumstances to enable you to characterise this act. But we can not stop here. We must now proceed further to see whether the claim of this defendant, that in the killing of Wilson he did what he had a right to do, is well founded. You understand that this claim of right does not exist in your imagination or mine, or in the imagination of this defendant, or in the imagination of his counsel even. It exists only in the solemn forms of the law;
it is found only in the solemn declaration of the law. And if you
257 find the existing condition as you see it by the light of the circumstances is not one that brings this defendant within the pale of that law, he can not invoke it. If these facts and circumstances put him there so that he can stand upon it as a rock of safety, he is entitled to invoke it, and entitled to its application to his case. It is for us to see whether it is a condition that can be applied to this case. To do that we must go to the definition of it as given by the law, and I will express only two propositions involved in it as it is expressed in a case from which I read in very brief form, yet I ask you to note every word and sentence, because there is not a word or a sentence in it that is not pregnant with meaning, that is not filled with the great principle that goes to make up the power of that law, and all of them must exist before the defendant can invoke it, all the elements that go to make it up, just as all the elements of a crime must exist before you can find that crime has been committed. In passing in review the principles of this law that I am going to give you, you are called upon to bring your minds to the position of these parties there at the time of the killing, their attitude, and the relation they bore to each other, to what were the circumstances which lead up to this affair, and all these things, just as you are called upon to do that when you are looking at the other propositions to see, whether they exist or not.

I now read to you from a case that is eighty years old, where this great law was declared by an eminent jurist in such a way as that it has never been
shaken by an intelligent court nor by impartial critics. It is on the
258 right of the citizen, the right of the individual to destroy human life, the right of the man who acts upon surrounding circumstances and facts to take away the life of another. If the right is found at all to exist as embodied in one or the other of these propositions, this definition is entitled to it. Now, what is the first proposition? Before I read it I say to you it contemplates a state of actual danger, real danger, in this case to this defendant at the time of the killing, springing from the hands of Floyd Wilson, and danger that he did not create, or bring into existence by a wrongful act of his, because when we undertake to enter upon the execution of as grave a design as the taking of the life of individuals, we must enter upon it with clean hands and a pure heart. If we have created a condition that leads to a deadly result, the law of self-defense does not

apply to it; if we create that condition by doing a wrongful thing upon our part which would naturally or reasonably or probably produce a deadly result, the law says there is no self-defense for us, because we are in the wrong in the first place; and especially does that principle apply to a case when we are doing an act which from its nature and the way we are doing it death would be naturally produced in the conflict that may ensue, because of the act that we do. I say, then, we must enter upon the execution of this grave act upon our part *we* clean hands and a pure heart, or, as this law expresses it, we must be in the lawful pursuit of our business. It says, that a man who is in the lawful pursuit of his business—that means doing what he had a right to do—in the right at the time—is attacked by another under circumstances which denote an intention to take away his life, or, it may be, to do some enormous bodily harm,
259 may lawfully kill the assailant—when?—provided he use all the means in his power, otherwise, to save his own life, or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him if it be in his power. Now, that is the first proposition of the law of self-defense. Now, let us see again, by enumerating each condition that must enter into it, what they are. First, we must be in the right; we must be doing what we had a right to do at the time of the killing, and when we are so situated we are attacked by another. How? What sort of attack? Why, under circumstances which denote, from the character of the act and the way it is done, an intention to take away our life or do us some enormous bodily harm, under such circumstances, provided still we did not bring on the conflict by a wrong upon our part which would necessarily and naturally precipitate it, under such circumstances we may lawfully kill the assailant, provided we use all the means in our power otherwise to save our own lives, such as retreating. That is what the law says. We frequently hear it in argument that that is not manly. It is not manly to save human life when we can do it! It is not manly to obey the golden rule! It is not manly to obey the laws of your country when they say in thunder tones everywhere that before taking human life, though the man whose life is taken may be in the fault, we must do everything that we reasonably can to prevent that last resort, that last thing we can flee to. We must avoid the necessity for it if we can. We must use less violent means than that which would produce death if we can in that way take away the danger. Now, in this case, this contem-
260 plates as far as this case is concerned, that at the time that Floyd Wilson was killed that this defendant was in the right; that he was doing exactly what he had a right to do, and when so situated he was attacked by Wilson in such a way as to indicate a deadly purpose upon his part. About that there can be no question—that is to say, if Wilson shot at him, shooting at a man is evidence of a deadly purpose, and when that transpired, if he could not by the exercise of any other reasonable means, or doing of any other reasonable act, such as surrendering to the officer, such as by his action taking away the necessity of exercising of any more force, that he could not do that and stop the difficulty, or that he could not do it by avoiding the condition that existed, or that he could not do it by exercising less violence than he did exercise, he could kill Wilson; but there must be an absence from the case of these propositions

before this principle of the law of self-defense can be applied at all of the case. He must be in the right, he must be doing what he had a right to do. We will see after awhile whether under the law his position was of a character that he was in the right, that he was doing what he had a right to do, and that Wilson wickedly, unjustifiably, without reasonable cause, attacked him in such a way as to jeopardize his life, and that he could not escape from that danger except by taking his life. You will understand presently that these two propositions—this one and the next one I am going to give you—are both intimately connected with the propositions of the law defining the rights and prescribing the duties of officers and of citizens. The other proposition of the law of self-defense is one where the danger to life may not be actual; it may not be real; it
261 may, as a matter of fact, turn out not to have an existence. You would naturally inquire whether a man can take human life when he thinks that he has a right to do it, when he thinks that there is danger to his life, and he acts upon that thought and executes the purpose. Why, of course that would be a monstrous proposition; that would put it in the mind and heart of every man taking human life when he was broughtt before you and tried for it to say, "I thought I had a right to do it. It turned out I did not have; but I thought I did, but I didn't from what you tell me of the law here, but I thought I had." That, I say, would be a monstrous proposition. Human life would not be worth anything if such was the case. The power of the law to protect it would be entirely destroyed. It does not mean that. It means when there are facts and circumstances in existence that would lead reasonable men situated as was the defendant to the conclusion that there was danger to his life, and that he could not avoid that danger except by doing as he did do, it was then and there imminent, hanging over him, and he could not turn it aside except by the deadly result produced by him. Now, you see, you are the arbiters finally of whether that condition existed or not, such a condition as would satisfy a reasonable man situated as he was that there was deadly danger that he could not avoid except by doing as he did do. You are to pass upon that. You could not do it with any certainty if you depended alone upon his condition of mind as shadowed forth by his thoughts when he was before a jury. There is nothing by which you can square his declaration to prove the situation true. There are no facts or circumstances you could take up by their all fours to see whether they
262 tend towards that conclusion or not.

The law requires the existence of such facts and circumstances, because it says in this proposition, "When from the nature of the attack," the nature of the attack made, the man who is killed is making an apparently deadly attack; it seems to be deadly from the way he is executing it, and the party acts in good faith upon that principle—he may be deceived by it, but if he exercises reasonable diligence to learn the truth, and these facts and circumstances are in existence in such power and force as to lead a reasonable man situated as he was to a like conclusion, and they are not of his creation by his wrongful act, then he can act upon the facts and circumstances, leaving to you as his triers and as his jurors to say whether these facts and circumstances were sufficient to lead him to that conclusion. Low, let us read the proposition to see whether it bears out what I have said to you: "When from the nature of the attack there

is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended." He is deceived by the facts and circumstances. He looks at them as a reasonable man would look at them situated as he is, and in the light of the surrounding condition, and he is led astray. Now, let us see what sort of illustration is given of this proposition: "A shoots at B within shooting distance of him. B sees A make a violent demonstration, or he sees A make another sort of violent demonstration; that would lead a reasonable man to conclude that A had a deadly purpose, and he acts upon that state of case and kills A; it turns out that A had
263 no deadly design, but he was doing that which indicated that he had, then B had a right to act upon it, but if A had done nothing of the kind, if he had not done any act of that character, or if the act that he had done was one brought into existence by the wrongful conduct of B, then he could not act upon that condition; he could not slay upon it, and if he did he would be guilty of crime; he would be guilty of doing that which he had no right to do.

Now, these are the two propositions which embrace all the principles of the law of self-defense. Of course, persons may be differently situated with reference to each other. It is for us to look at their situation. We may have to go to the law to find out what their relative situation to these propositions are in the light of the law, but before doing that it is necessary that *that* I should remind you, as I have already told you in a general way, that a party may deprive himself altogether of every one of these conditions that I have named which causes to spring into existence the law of self-defense, and give him the right to invoke it; he may lose that right by his own bad conduct, because the law says he must be in the lawful pursuit of his business; he must be doing right; if he creates a condition by his own wrongful conduct, if he brings into existence such a condition, upon what principle of right could he invoke the law of self-defense, when he has created the very condition that he now invokes? For instance, among other things, is this: If a man goes to the place where the slain person is, or if he is at that place, with a deadly weapon, for the purpose of provoking a difficulty, or with the intent of having an affray, he can not invoke the law of self-defense, because he has no right to do that. If he is at
264 that place, and while there he is prompted by a design to do that which the law forbids his doing—obstructing or hindering or intimidating the execution of lawful process, by the exercise of force or violence of a dangerous character to the life of the officer—that is a crime under the laws of the United States If he is there armed and equipped for that purpose, and he is in that position, prompted by a design of that kind, and that is made manifest to the officer, then the officer has a right to invoke this law of self-defense from the time that condition springs into existence. This law of self-defense did not belong to the defendant alone, but it belonged to Floyd Wilson as well as the defendant, and it was thrown around him as an officer to the highest degree, providing he is in the proper exercise of his duty. It surrounds him at the time and at the place where he enters upon the performance of his duty; from that time he is panoplied with the whole power of the law of self-protection, of self-defense.

How unjust, how cruel, what a mockery, what a sham, what a bloody crime it would be upon the part of this Government to send a man out into that Golgotha to officers, and command them in the solemn name of the President of the United States to execute these processes, and say to them, men may defy you; men may arm themselves and hold you at bay; they may obstruct your process; they may intimidate your execution of it; they may hinder you in making the arrest; they may delay you in doing by it threats of armed violence upon you, and yet I am unable as chief executive of this Government to assure you that you have any protection whatever. It is for you, gentlemen of the jury, to say whether the rule invoked by argument in the defense as to the character of these laws, and as to the rights and duties of these officers, is the law of this case, or whether it is to be found as declared by the solemn declaration of
265 this great compact in the shape of the laws which bind the people of this country together, and which makes them a harmonious, united, and common people, harmonious and united in their desire to uphold and enforce the law against all violators and all offenders of it. Then I say to you in this case, that if this defendant was at that place, or he was going about the country there, and happened to be overtaken by these officers armed, and went armed there for the purpose of resisting the power of the law that was sought to be properly executed against him, if that was what prompted him to carry these arms, if that was his object, if that was why this conflict sprung into existence, then he engages in a conflict which he precipitates by a violation of law upon his part by a design to trample upon the law, by a design to set it at defiance, by a design to bid defiance to all the law and all its rights and all its power, when he does that, and if while doing it he undertakes to execute a wicked and unlawful purpose of that kind, and a conflict ensues in which he takes a human life, he is guilty of murder, provided that officer was in the lawful exercise of his duty. He is guilty of murder and nothing else.

Now, it may be proper in this connection before going further that I say to you there is a crime under the law—and it is embraced in this indictment—which is called the crime of manslaughter, which is of less grade, of less magnitude, of less wickedness, than the crime of murder, because there is out of it this terrible black thing called malice aforethought, this wicked thing which corrodes the heart and corrupts, yet controls, the mind. There is out of that crime, there is not in it at all, that element, because the law of the United States says that whoever kills
266 another wilfully and unlawfully, without malice aforethought, is guilty of the crime of manslaughter. I give this to you, it has not been asked by the defendant. They say their client is guilty of nothing at all; they asked you in the argument, I believe, one of the gentlemen, when you acquitted him to give him some meed of praise for his act. Well, the law does not require you to do that, and you had better stop with exercising your legal duties; perform your legal duty and go no further. There may be a state of case to which you can apply the crime of manslaughter. That is for you to say, not me.

Now, I repeat again, that in order to invoke these principles of the law of self-defense, and that the defendant may be panoplied in them, there must be out of this case that condition which I have given you which would deprive the defendant of the law of self-defense. It may be

proper in this connection to see how far a man can go and stop and it can not be said he has made a violent demonstration—or, in other words, what it takes to make such a violent demonstration as that would put a man upon the defensive, and give him the right to slay. Does a man have to wait until another shoots at him? Not at all, especially, as I remarked awhile ago, in this age when these weapons can be instantaneously used. An assault with intent to kill is an act which is punished under the law; it exists if the act of physical violence goes far enough that from its nature it can be seen that the party who may be committing it then and there is in the act of putting himself in a deadly position to his adversary. Do you have to wait until the gun is presented at you? What security to life against these deadly weapons would men have if this was so? Do you have to wait until the gun is fired? A violent demonstra-
267 tion which amounts to an assault with intent to kill, with a Winchester or pistol, may be made far short of that. If a man is making a demonstration with his gun and has gone far enough to show a purpose from the way he is handling it, from what he may have said, from his actions, a purpose to use it upon his adversary, then the man upon whom he is endeavoring to use it may stand upon the defensive, and especially is that true with reference to an officer in the exercise of a duty that he is commanded to perform. So, in this case, if this defendant was making a demonstration with his Winchester or pistol, that from its character, or from what he said, if it be true, if you find from the evidence that he was defying the officer after he demanded his surrender, or told him he had a warrant for him, if he was defying him by making a violent demonstration with the weapon, going sufficiently far with it to indicate to a reasonable man that his purpose was then and there to put it in position to use it, the man who stood opposite to him as an officer, from that time, stood upon the defensive—he stood upon the defensive all the time before that, in going to that place, and it remained with him as long as he was in the right.

Then you are called upon again to look at this situation, to see whether or not that was the state of case, to see whether or not this demonstration had been made, to see whether or not he was handling that gun, and if so, how he was handling it, and how far he had gone in handling it. That is necessary for another purpose. It has been claimed here that the officer was called upon to read the writ, make proclamation of who he was, and to do all of these things, before he had a right to arrest. Now, if this is cut off by the misconduct of the defendant by an act of threatened violence
268 upon the part of the defendant, so it was impossible for the officer to do it without sacrificing his life, without knowing the law would you decide, or would you hold, that he was called upon to do that? Would that look just? Now it becomes necessary at this time to see what the rights of officers are when seeking to make an arrest. In this case we are called upon to ascertain whether or not in the law this defendant killed a person who was an officer, whether or not Floyd Wilson was an officer under the law. It is claimed by counsel for the defendant that he was not; that Wilson was not an officer at all; that he had no power there; that he had no authority as an officer. This is a very important question to be determined; that is to say, if that position is correct or not, because while a man may have no power to make an arrest another man may not

have a right to kill him because he has not that power. Still, it is to be used, or could be used, to lessen the degree of the crime. Therefore it is highly necessary that we should ascertain if Mr. Floyd Wilson had any authority at that time. We have a law upon that subject, and section 2153 of the Statutes of the United States says:

"In executing process in the Indian country the marshal may employ a posse comitatus not exceeding three persons in any of the States, respectively, to assist." In what? "To assist in executing process by arresting and bringing in prisoners from the Indian country, and allow them three dollars for each day in lieu of all expenses and services."

That is the authority under which Mr. Dickey, the marshal, acted in engaging the deceased, Mr. Wilson. I say to you that upon an inspection of his commission and oath of office, which have been introduced
269 as evidence before you, the court charges you that Mr. Dickey was a United States deputy marshal for the western district of Arkansas, and that he had full powers as such; and I say to you further, that under this statute he had a right to make an arrangement with Mr. Wilson to go with him to assist him in arresting and bringing in this defendant or any other persons whom he might seek to arrest. Now, the law says that he shall have authority to employ them, and that they may be as many as three persons out of either of the respective States. It is claimed that Wilson was not employed by Dickey in the State; that he was employed in the Indian country. This statute gives authority to get persons who live outside of the Indian country. At the time this statute was enacted it was a problem whether they could find men in the Indian country who either from fear of the danger surrounding them, who would assist officers in arresting persons, and it is a grave proposition in many cases yet. Sometimes fear deters men, and they can not be blamed for it; sometimes fear deters them from testifying about what they know; and sometimes fear deters them from giving information to officers. But the purpose of the law was to get persons outside of the Indian country to go. The fact that Wilson was at Wagoner at the time this officer engaged him to go with him does not cut any figure. He lived in Fort Smith, and it is not material in this case whether he engaged him at Wagoner or not; if he engaged him there he had a right to. It was said in argument by the defense that there was no proof showing that Wilson was registered as a possee. There is no law requiring him to be registered. This court prescribed a rule a good many years ago that the marshal should have his posses registered. It is complied with only occasionally. It is only a
270 rule of the court, and there is no statute of the United States on the subject, and there is no law that takes away the power of a posse because he is not registered; and if he was engaged at that place by Mr. Dickey, then he was a competent man for the purpose for which he was engaged, and the law says he may go. Let us see, again, what the law says they are to do: "To assist in executing process." How? "By arresting and bringing in prisoners from the Indian country."

To assist in executing process by arresting prisoners. He has full power, full authority, especially in a case like this, when he was as one in the immediate presence of his chief, as the evidence shows he was of Dickey; they were both there together. The posse has the power to assist the officer in making the arrest. The posse has a right to assist in the arrest

and bringing of prisoners here that their cases may be inquired into, and that it may be ascertained whether they were guilty or innocent. Now, then, Wilson was armed, according to this law, with full authority, with full power, to accompany that officer and to assist him in making arrests; and especially, I say, he had that right in the presence of the officer, and who was near enough in his presence to be regarded as being there, in the eye of the law, and the officer having his authority by virtue of an appointment legally made and an oath of office administered to him by this court. Wilson and the officer, then, had legal authority to enter upon the mission they did enter upon. And what was that? What was this posse to do? What was he commanded to do? To go into the Indian country and hunt up Mr. Starr, and say to him that on a certain day the judge of the Federal court at Fort Smith will want your
271 attendance at a little trial down there wherein you are charged with horsestealing, and you will be kind enough, sir, to put in your attendance on that day; and the judge sends his compliments to you, Mr. Starr. Is that his mission? Is that the message from this court that is to be handed to Mr. Starr upon a silver platter with all the formalties of polite society? Is that what Floyd Wilson was employed or engaged to do?

No. This court did not have anything to do with that command; it does not go in the name of this court; it goes in the name of the chief executive officer, the President of the United States. What does he say, of course acting for the people? "Whereas complaint has been made before me"—that is, before the commissioner—"char'ing Daniel Newcomb, Jesse Johnson, Henry Starr, and Ben Benjamin with having on or about the 17th day of August, A. D. 1892, in the Indian country, within the western district of Arkansas, committed larceny; now, therefore, you are hereby commanded, in the name of the President of the United States, to apprehend said Newcomb, Johnson, Starr, and Benjamin, and bring their bodies forthwith before Stephen Wheeler, commissioner," etc., duly signed and executed by the said commissioner. The commissioner had authority to issue the writ. The court tells you that as a matter of law. It was admitted that Stephen Wheeler was a duly appointed commissioner of this court, and that this is his signature to this writ. Therefore, here is a paper legally issued and put in the hands of the marshal, who had a right to employ this assistant, and they entered upon the execution of the warrant. They were, then, lawfully commissioned, and they had a right to
272 execute that paper, and they had a right in a legal and proper way to overcome all opposition to the execution of it; and you will bear in mind that under the laws of the United States it is a crime for a person to interfere with the execution of papers of that character, for the law says, in section 5398, Rev. Stat., that—

"Every person who knowingly and wilfully obstructs, resists, or opposes any officer of the United States in serving, or attempting to serve or execute, any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process, or assaults, beats, or wounds any officer or other person duly authorized in serving or executing any writ, rule, order, process, or warrant," shall be punished, etc.

There is a statute which makes it an offense to impede, obstruct, hinder, or delay the execution of a process of this character. Now, then, the officers started upon their mission. And with what authority are they

clothed? It did not make any different to the officer, as far as his powers are concerned, whether this defendant was guilty of that crime or not. The officer is not called upon to inquire into the guilt or innocence of the man. If he should be satisfied after arresting him that he was innocent he has no right to turn him loose, but he must bring him here to the place where he is commanded to bring him. His guilt or innocence, then, is not a question the officer is responsible for. The President of the United States commands him to execute that paper, and he proceeds upon his mission. Now, he has to do that in a lawful way. And how is he to do it? If he meets the man whom he is seeking to arrest the general rule is
273 that he is required to make proclamation of his character and of his mission; but if the actions of the party whom he is seeking to arrest prevents him from doing that because of the act of the party creating danger to the life or to the person of the officer of a deadly character, then he is not required to do that; he is cut off from exercising this duty. He is required to make proclamation of his character and authority if the occasion permits it. But understand that this officer, as I have told you, when he enters upon his duty in a legal way, starts out in the right; he has a right to arm himself to overcome resistance; he arms himself that he may successfully carry out his mission; he arms himself that he may execute the warrant in his hands. He has a right, therefore, to carry arms. He is not setting at defiance anybody when he is doing that. He must, as a matter of prudence, prepare himself in that way. He enters upon his mission, and when he approaches the man he is seeking to arrest he must make his proclamation of who he is and what his mission is.

Now, it is not necessary that he should make proclamation that he is Smith or Jones or Floyd Wilson; he must say that he is an officer. or that he has a writ, or something to indicate that he is an officer. If he says, "Hold up, I have a writ for you, or a warrant for you," that implies that he is an officer, that he has official authority, because if he is a citizen, though armed with a writ, he can not execute it under the law; he could not be anything; but an officer with a paper of that kind in his possession, and if his chief had a paper, if Mr. Dickey had a paper in his possession, and at the distance where this killing occurred from where Dickey was, Wilson made the proclamation that "I have a warrant for you," or "a writ for you," he was not required to go any further than that at that time.

274 Now, it is claimed that the officer must read the writ; that he must call the attention of the party who he is arresting to the writ by reading it to him before he can take him into his custody. Let us see what the law says upon that subject; let us see if he is called upon to do that. This power of arrest is a thing done in the interest of the whole people, and it is so much greater than the right of any individual citizen to his liberty. The power is to be executed by first safely getting the prisoner in his custody and then showing the papers to him. He is not required to stand up and read the warrant to him formally before he arrests him. That is not the law; the courts have not so adjudicated it. In the case of the Commonwealth versus Cooley et al, 6th Gray (Mass.), 350–356, the supreme court of Massachusetts decides that:

"Whenever an officer, by virtue of a warrant directed to him and placed in his hands for service, arrests the party against whom it has been

issued by a court of competent jurisdiction, the law imposes duties upon each of the parties which they are respectively bound to observe. The officer is to explain the cause for which he makes the arrest; to state the nature and substance of the process which gives him the authority which he professes to exercise; and if it is demanded of him to produce and exhibit it to his prisoner for his persusal, that he may have no excuse for resistance (1 Chit. Crim. Law, 51). On the other hand, the accused is required to submit to the arrest, to yield himself immediately and peaceably into the custody of the officer, who can have no opportunity until he has brought his prisoner into safe custody to make him acquainted
275 with the cause of his arrest, and the nature, substance, and contents of the warrant under which it is made."

The officer has first to arrest his man, and the party has no right to demand the warrant, he has no right to see the cause of his arrest until he has been placed safely in custody, because the right of the officer to have him safely in custody is so much the greater than the party's right to know the cause of his arrest, which he can know fully afterwards when in custody, that the law says the officer's first duty is to make the arrest. I could occupy your time for a long while reading a reiteration of this principle which is declared time and again in adjudicated cases. It is recognized by the supreme court of Pennsylvania in the case of Shovlin et al versus Commonwealth (106 Penn. State Rep. 369), wherein that court remarks:

"On the other hand, as is said in Commonwealth v. Cooley et al. (6 Gray, 350, 356), 'The accused is required to submit to the arrest, to yield himself immediately and peaceably into the custody of the officer, who can have no opportunity, until he has brought his prisoner into safe custody, to make him acquainted with the cause of his arrest, and the nature, substance, and contents of the warrant under which it is made. These are obviously successive steps. They can not all occur at the same instant of time. The explanation must follow the arrest, and the exhibition and perusal of the warrant must come after the authority of the officer has been acknowledged.'" * * *

When a man stands with his gun in his hand and his pistol in his belt, and the officer commands him to surrender or to hold up, and he says to the officer, "You hold up," with his gun in a threatening position,
276 if that be the attitude of it, the officer is not required to show his authority; he has no time to do it, because the law says to him that from the time he enters upon this mission he has the law of self-defense in his favor and his behalf, and that he has a right to invoke it as long as he is in the right. It says to him, "You have a right to stand upon it; you have a right to watch for your safety and your security, because although this Government sends you upon a dangerous mission it undertakes to protect you as long as you are in the proper exercise of your rights or execution of your duties."

It therefore says to him, "First take your man safely into custody; then explain to him the cause of the arrest, because you are safe then; the man can learn then why he is arrested, he may know why he is restrained of his liberty." But before he is called upon to do that, the first duty of the citizen he is seeking to arrest, if he knows either expressly, or if he has reasonable ground to know that the man has authority to act as an officer, is to submit to that authority peaceably and quietly, to sub-

mit to the arrest, and then he is in the right, and then the officer is to show to him his authority, show him the cause, and to make a full explanation of it to him if he demands it. This general practice is only applicable to arrest with warrant under control of the law. Now, that is the doctrine of the law upon the subject of exhibiting a warrant. Now, how far did the right of these officers go in making this arrest? What could they do if the arrest was obstructed, if it was resisted, if it was impeded so as to give the defendant a time to escape? If the defendant did that which obstructed it, which impeded it, which hindered it, which delayed it, he was in the wrong, and the officer was in the right, and if
277 that act of obstruction was being willfully done, and intentionally done, that act of hinderance, or the act of delay was by a threatening position of a dangerous weapon, then the officer had a right to so far stand upon the defensive as to do that which was necessary to overcome that obstruction, because he is commanded to execute this paper, and if the party offers resistance, and if that resistance is of a dangerous and deadly character, the officer can overcome it by an act of deadly violence if the party is seeking to obstruct or to hinder or delay the execution of the process by resistance of a deadly character, and in this way is enabling himself to avoid capture, to get away, to escape, he is doing that which gave Floyd Wilson, in this case, the right to overcome that obstruction and that resistance that was offered to him in the execution of this process.

A great deal has been said in argument about the action of these men in going to the house of the brother-in-law of this defendant in the night time, and entering that house in the way described, as described by Dickey and the woman who was in the house at the time. There is great divergence in their testimony. You are to see which is true.

Officers in the search of prisoners charged with high crime, like this crime of horse larceny, for which a party can be sent to the penitentiary for 15 years, have a right to enter upon the execution of process, and here is what the law says they have a right to do:

"In order to execute a criminal warrant, or to arrest for felony on reasonable suspicion, or to quell an affray then in progress, an officer has a right to break open the outer and inner doors of a house to effect
278 an arrest. And the officer is justified, even though it should turn out that the person sought is not in the house at the time, for the officer has a right to search there."

The dwelling house is a sacred castle; there is no doubt about that; but it is not a place where wrong can be committed by men who are charged with crime, making it a haven of security, especially in this country, where we do not have houses of refuge for criminals. In old times, when there was a privileged class, if a man could get to a certain place he was safe from arrest; no officer could touch him; no one could pursue him, no matter what the crime. But at this time, and in this country, the strong arm of the law reaches out, in the shape of its officers, and follows the man of crime wherever he goes, and he who undertakes to shield him, to conceal him, to hide him in his house, is converting his house from a castle, where peace and order and reverence for the law belongs, to a house of refuge for crime and criminals, and the law says the officer may follow the man who is charged with crime there, and this sacred invocation of the

liberty of the castle cuts no figure when officers are honestly and in good faith in search of a man for whom they have a warrant charged with larceny, because I say to you that larceny is an infamous offense; it is a felony at common law; and not only that, but it one of the most infamous offenses; it implies special turpitude, and it is regarded for that reason as an infamous offense, and an officer, when in the discharge of duty, when seeking to arrest a man charged with that sort of crime, has a right to search the house; it is his duty to demand admittance; it is his duty to make his mission known, if he can, with a due regard to his own safety, but if proclaiming it would imperil his own life he need not do that even.

279 I say, when he can with due regard to his own safety make his mission known, it is his duty to do so, to demand admittance into the house, and if it is not promptly opened, or opened in such a time as he thinks it ought to be, taking into consideration the fact that the party may have a chance to escape by delay, he can break in the door, because it is no longer a sacred castle. It is a place, if he has reasonable ground to believe that the man he is seeking for has taken refuge there from justice, that he has a right to go and arrest him; or, as I repeat a ain, the power of arrest is a power in the hands of the people so much greater, for their safety, than the right of any citizen individually that this power can be executed even there.

Now, to what extent may the officer go? What must be the conditions that would give him the right to use force or to use violence in the execution of this process? The officer armed with a lawful warrant, or in making a lawful arrest without a warrant, has a right and it is his duty to use every necessary means to make the arrest when the party is charged with a felony. If it is resisted, he may use force, and such force as is necessary to overcome the resistance, even to the taking of life. In such a case, if the person resisting is killed by the officer, it is justifiable homicide. If the officer is killed, it is murder. That is one state of case where there is resistance offered. Now, I call your attention especially to the proposition where resistance is offered which is of a deadly character; the officer then having the right to carry arms, and having the right under certain circumstances to use them, and he being in the right, taking himself to that place for the purpose of executing the writ, and if resistance that threatens death, if resistance of a deadly character, is opposed to him, he

280 may overcome that resistance and get it out of the way by killing its author. If that resistance was standing up against him so that he can not execute the process without overcoming it, and it is necessary to overcome it, he can slay the author of it upon the ground that he has a right to execute this arrest and to overcome all resistance of this kind to the execution of it. Now, I say again, it becomes necessary for you to look to see what is necessary to constitute this resistance. In the language of law that I have given you, when a demand is made, or if the man actually knows or he has good ground to know the purpose of the man in seeking to arrest him and he does not submit to an arrest peaceably and quietly, he puts himself in*n* the wrong. If he carries himself*f* to the point where he is obstructing that arrest by making it impossible for the officer because of his conduct to peaceably take him, then*n* he is violating a statute of the United States. If that obstruction is of a threatening and deadly character, he is in an attitude where it becomes the duty of the

officer to execute the process by destroying that power, and at the same time to look out for his own safety by standing upon the defensive. How far does he have to go?

Is it necessary for the officer to wait until the man he is seeking to arrest points, his gun or pistol at him or shoots at him? If he bids defiance to the officer, if he is handling his gun in a threatening way as if he intended then and there to use it, putting it in threatening attitude, he would be guilty of an assault with intent to kill at that stage, and the officer would have a right to overcome that force by an act of violence that would destroy his life if he could not overcome it by any other reasonable means. And if that was the condition as existing between Floyd Wilson and this defendant, then Floyd Wilson had
281 a right to fire upon the defendant if he stood the authority of Wilson at defiance after knowing that he was an officer by proclamation or from good reasons and grounds—he could have known it; and it was not necessary that he should know it was Floyd Wilson; if he knew he was an officer from the actions and declarations of that officer or from other facts and circumstances, such as that he was looking out for officers, such as that the actions of the man were in harmony with the actions of an officer who was seeking to arrest him, he would have this fact brought to his mind by reason of these facts and circumstances, and it is your duty to find out whether he knew or had good ground to know as to what the purpose of Wilson was at that time, and just what attitude he put himself in, what was his condition at that time. If he was seeking to escape, knowing the officer's mission or having good grounds to know it, he was seeking to avoid that arrest, to stand the officer off until he could get away, then the law says that in the execution of this process, if the officer could not capture him in any other way, he had a right to take his life.

That is what the law says in case of escape or deadly or dangerous resistance, either one, and as I charge you especially in case of resistance that might be of a deadly character, that might be dangerous to life, that might jeopardise the safety of this officer, who, as long as he was in the right, was in the attitude of protection under the law.

Now, let us see a little further as to the rights of officers and as to the rights of citizens with regard to the right of resistance when pursuit is shown.

"An officer or private citizen arresting a felon may use force sufficient to overcome the person sought to be arrested without imperiling his own justification so long as he does not use excessive force. No man
282 would attempt to arrest a felon, said the supreme court of North Carolina, "if he was not allowed the advantage of overcoming the resistance without subjecting himself to peril. He need not, therefore, engage with a felon on equal terms, but may overcome the resistance with superior force, even to the extent of killing the felon if it be necessary. Thus, said Lord Hale, the killing of a felon may be justified if he resists or flies, if he impedes or obstructs that he may resist or that he may fly. If he makes preparation for flight, the officer has a right to execute his process at that time. This would seem to put resistance and flight upon the same footing. But this must be understood with some modification. In case of resistance and conflict the resistance must be overcome then and

there, because not only is the arrest of the felon involved, but the safety of him who is rightfully making the arrest. But ordinarily there is not the same urgency in the case of flight; for, although he be not arrested then and there, yet he may be arrested at another time and place. So it would seem that, at any rate, there ought to be pursuit, or a certainty of escape before before killing could be justified * * *."

In case of resistance the thing exists then and there, and it threatens the execution of the process, and it threatens the life of the officer and is of a deadly character, and it is of that nature that the officer has a right then and there to act. The officer has a right to then and there act, if that be the condition, to the extent, if necessary, provided he can not execute the process or turn aside the danger to himself in any other reasonable way—

283 he has a right to act even to the extent of taking the life of the party who is resisting. That is the law, and that is what you have sworn to enforce in this case.

Now, again, there are other provisions with reference to the rights of these men. If an officer is killed in making a legal arrest, as I have already told you, if he is executing an arrest in a legal way, the killing is murder, and nothing else. He has a right t use such forceas is necessary to accomplish his purpose, if these conditions exist. He must keep himself in the right; he is not permitted to go to extremities when it is not necessary. You are to look at the two conditions. You are to see whether this condition of threatened violence then and there impending and about to fall from the hands of the defendants was in existence at that time, and if that is the case the duties and rights of the officer are very different from those that he would have a right to exercise, or that would be incumbent upon him if it was a condition of peace and no resistance was offered. The officer would have no right to act towards a peaceable citizen who was making no resistance, who was not doing anything that imperilled him or that threatened his life, and not in a violent way acting towards him as though his life was sought, as he would in the other state of case. If the defendant was in such a peaceable position under such circumstances he would have a right to kill, have a right to slay the officer, if he could not turn aside that condition in any other way, if the officer was in the wrong by using deadly violence upon him, but if he could then it would be his duty to adopt such means as would be less injurious than that of taking life, having a due regard to his own safety.

Now, a word as to manslaughter. If the arrest in this case was illegal under this law I have given you, or the attempt to make the arrest,

284 for the arrest was not executed, the defendant would have a right to resist it so far as to prevent the arrest. You will understand that the mere fact of an illegal arrest does not give a man the right to slay, because a restraint of liberty is not to be put in the balance and weighed against a human life, no more than property is to be so weighed and so balanced, and if the arrest be illegal he has no right to slay in resisting it. He has a right to so far resist with such force as to prevent the arrest, but if he exceeds this and uses more force than was necessary to prevent the arrest, the killing by the use of such force would be manslaughter, provided the killing was the result of hot blood and anger growing out of an unwarranted and unauthorized attempt upon him, or an assault upon him by the officer, by an unauthorized or unwarranted attack

upon him by the officer. But if the killing under such circumstances was cruel, violent, and unnecessary, the same would be murder. If it had these characteristics that were cruel, that were brutal, that were unnecessary, though the arrest attempted to be made might be illegal, yet the killing would still be murder, because then the law would say that it grew out of malice aforethought as evidenced by the cruelty and the brutality and the wickedness of the act, rather than out of a state of heated passion or a hasty condition that the man was thrown into by the unlawful act of the officer in seeking to make the arrest.

Now, I have told you it is the duty of the officer whenever occasion permits to make proclamation of his purpose, to tell his mission. If the act of threatened violence upon the part of the party that he is seeking to arrest renders that impossible, he can stand upon the defensive and
285 make the proclamation when that condition is overcome, because he is not required to stand there and give up his life while he is making the proclamation; he is not required to put his life in deadly peril while he is making the proclamation. It is necessary for us to see, first, whether the officer—the posse who had a right to arrest this party under this warrant, who had a right to arrest him and bring him to justice—whether or not, first, he made a proclamation of the fact that he had a warrant for him, and for his hold-up, and if so what was the nature of the conduct of the defendant in response to that, because these facts are very material; it is very necessary that you should look to them. They come from the statements of witnesses as positive facts, and you are to go through the whole case to see whether there are other facts and circumstances that corroborate the positive statements of Mrs. Padget. She has been subjected to a very severe test, and I say to you, gentlemen, that no witness is to be set aside by the mere denunciations of counsel, no matter how severe, how fierce, and how hard such denunciations may be. There are rules prescribed by the law by which you are to view the testimony of witnesses, and these rules are the ones you are to apply, because they are reasonable, they do justice to the witness. Witnesses are not to be dragged into the courts of the country, and to have their testimony kicked out of that court by violent attacks upon it, unless that attack is warranted by the facts and by the circumstances, by the character of that evidence, by its inconsistency, its improbability, its unnaturalness. These are the things that you as jurymen deliberately and dispassionately are to apply to that evidence to see whether it is true or not. You take it, you apply
286 these tests to it, but you do not stop there. You look at the other facts and the other circumstances, to see whether they corroborate the statements of these witnesses in your judgment as reasonable men, whether they render it more probable that they assert the true condition. To do that you take into consideration who these men were; who Floyd Wilson was; what his mission was; who the defendant was; what he was armed with; what Wilson's purpose was, and what the defendant's purpose was; and you also take into consideration the condition of this defendant. If the evidence shows you that he was a fugutive from justice, and that the officer probably knew that, the officer in making that arrest had a right to take that into consideration.

He was a fugutive from justice if he had jumped the bond he had in this court, as they say; if he had forfeited his bond, and was up in that

country hiding out from his usual place of abode to avoid arrest, he was then a fugutive from justice, and you have a right to take that condition into consideration; and in passing upon the question as to what was the probable action of these parties at that time, as to what would be the rights of the officer and of this defendant, you have a right to see this transaction in the condition that surrounded it, and as it was characterised by the position of the parties towards it. You have a right to look at that condition, and see if he was expecting officers to pursue him; if he was hiding away from them, avoiding arrest, he was then a fugutive from justice, and if that was true it is a fact that becomes pertinent for you to take into consideration, and the question as to whether he had reasonable grounds from what transpired to know that Floyd Wilson was an officer and was seeking to arrest him. These things are very material. It is very necessary for you to pass upon them.

287 I have now told you that it is the duty of the citizen to submit to arrest peaceably if it is sought to be executed properly. I have undertaken to tell you what is the proper method of executing this arrest. It is largely dependent upon the circumstances of such case. The same things would not be required of an officer in the presence of deadly danger to his life, when the process he was attempting to execute was resisted, as would be required of him in the presence of a peaceable condition, if he was seeking to arrest a peaceable citizen, a man who was unarmed, and who was not seeking to avoid the law. All these things are to be looked at. The officer stands before the law with his rights as a citizen; these rights are not to be taken away from him; they belong to him, and they are to be given to him in every case where he has not forfeited them by his own conduct and by his own actions. It is the duty of the citizen to peaceably submit to arrest, and he has the right when called upon in the proper way, in the way I have named to you, after submitting, to call for the authority for his arrest; it is the duty of the officer then to present it; it is the duty of the officer to give it to him, but not until he has secured his prisoner, not until he has overcome by arresting the party all danger to his life, because I say to you that when this Government commands its officers to go upon these missions of danger, and it maybe of death, it undertakes, as long as they are in the right, to throw around them the panoply of its power and its protection; they are but the manifest spirit and the voice of that law that you are seeking to have executed; they are the agents for its execution. The law is powerless for protection unless it is executed; it can not be executed against men charged with

288 crime until they are first arrested and brought where it can be executed in a lawful and proper way. The first thing to do then is to arm the officers with proper authority and send them upon their high mission, commanding them to execute, in a proper and peaceable way, whenever possible, their warrants, but at the same time to say to them, you have a right to stand upon the defensive as long as you are in the right, and when your process is sought to be obstructed or impeded, or you are hindered in the execution of it by violence of a deadly character, you can overcome it by death to the party who then obstructs or impedes the arrest, if you can not destroy it in any other way, provided the crime he is seeking arrest for is a felony.

If your prisoner has escaped, or is preparing to do so, has stood you off, and is preparing to escape, you may overcome that condition by using such violence as is necessary to overcome it and prevent an escape.

If the man you are seeking to arrest sets your authority at defiance, heaps indignity upon you by holding you at defiance when you are armed with this power of the law, you may overcome that condition by the use of such force as is necessary, even to the extent of taking life if that act of threatened violence be of a dangerous or deadly character.

And then I say to you again, to go to this occurrence, see what did take place, see what was the attitude of these parties. If, under the law I have given you, Floyd Wilson was in the right, if he was seeking to properly execute, according to this law, this process, then he was in the right, and any resistance offered by this defendant would put the defendant in the wrong.

You are to see what did occur; what was the final result; see what all the facts and circumstances surrounding this case were, and if
289 you are satisfied beyond a reasonable doubt that the condition is established, that under the definition I have given you is murder, your duty is to say so; because if that does exist it is not only the life of Floyd Wilson that has been taken, but it is the power of the law that has been set at defiance, and although the taking of the life of Floyd Wilson in a murderous and wicked way is a great and high crime, the crime of setting at defiance the law of this country, which protects every good citizen in it, is even a higher crime than the loss of that citizen's life, or that officer's life.

And I say to you, if you are satisfied of that condition beyond a reasonable doubt, it is your duty to say so, and it is your duty to see whether that condition exists in the law, and the evidence in this case fairly and dispassionately viewed, doing justice to each and every witness, weighing their evidence in its own light, and in the light of the other witnesses.

The fact that a man is in the employ of an express company is no reason why you should disbelieve him, and his testimony is not to be set aside by abuse hurled at him or by jests or sneers at his expense. It is to be regarded in the law solemnly and dispassionately, weighed justly and impartially. If it is not true when you look at it in the light of its reasonableness and consistency and probability, you discard it; but if it is true, this man, instead of being derided, instead of being abused, the officer who attempted to execute this process is to be commended for it, because it is upon the execution of the law that we all depend for safety.

Now, again, this woman's (Mrs. Padget's) evidence is not to be set aside because she has been denounced as a Judas Iscariot. That does not impair the truthfulness of any witness's evidence. It is not a crime to give
290 information of a man who may be charged with a crime. The law of the United States says that if any citizen knows of the commission of a crime and conceals it, he is guilty of a crime that may send them to the penitentiary for three years.

If these men were seeking to get information of the whereabouts of that man and this woman gave it, instead of being abused she is to be commended, because it is the duty of every citizen to do it, and it is neither good morals or good law to denounce her for it. She is to be commended and held up as a woman in favor of law and in favor of peace and the

good order of society. I ask you to do her justice; I ask you to do all these witnesses justice; I ask you to take their evidence and weigh it in the light of these principles of the law I have given you to weigh it, and if you find the facts are worthy of consideration and belief believe them; if they are not, disbelieve them; but look at them as to their probability, consistency, and reasonableness. You will take into consideration all these facts and circumstances. It is my duty under the law to say to you that you have no right to draw any inference against the defendant because he does not go upon the stand. He has a right to go upon the stand or not as he pleases. He can stay off of it if he wants to, and you can not draw any inference against him because he did not avail himself of that right, and it is my duty to so admonish you; but it is my duty also to say to you that if he has made statements, or has made admissions about this transaction, you are authorized to believe those which may be against him and to disbelieve those which would be in his favor. Now, let us see if that is the law:

291 "The jury may believe that part which charges the prisoner and reject that which is in his favor, if they see sufficient grounds for so doing. If what he said in his own favor is not contradicted by evidence offered by the prosecutor, nor improbable in itself, it will naturally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case." (Green. Ev., sec. 218.)

This refers to any admissions or statements he may have made and that have gone in as evidence before you in regard to this matter. Of course, the reason of that rule is that he is an interested party, and he would make statements in his favor more naturally than he would those against him, and you may for that reason believe those against him and disbelieve those in his favor.

I have been asked by counsel for the defendant to make certain declarations of law. Some of them have already been given substantially. As qualified by the charge of the court they are given. Standing alone, without being modified, they would not any of them be law, in my judgment.

"If the jury find from the evidence in this case that Floyd Wilson, the deceased, had lawful authority to make the arrest of the defendant, yet that deceased in making it, or attempting to make the arrest, acted in such a way as to endanger the life of the defendant, or to threaten him with great bodily harm, that the defendant neither was fleeing or resisting arrest, then the defendant would have the right to defend himself, even to the extent of taking the life of the deceased if it was necessary."

The following is added as a modification: Provided the defendant was neither fleeing nor preparing to flee by standing the officer off by acts of threatened violence. It is given in that way.

292 "The court instructs the jury that if the defendant, being placed in a position in which his life is imperilled, and slew an officer of whose official character he has no notice, or had no reasonable ground to know his character, this is homicide in self-defense, if the killing was apparently necessary to save the defendant's life; nor does it matter if the officer was legally seeking to arrest the defendant, the defendant having

no notice of the fact or no reason to know what the purpose of the party was: Provided the defendant did not by his threatening and violent conduct prevent the officer from making his character and mission known."

That is in connection with the principle I have given you, that if a man stands up and obstructs arrest, prevents arrest, armed with deadly weapons, and using them in a way that is threatening, then the officer has no time, nor is he called upon, to make proclamation. The officer can stand on the defensive and overcome the danger and take his man, or overcome him, by violence if necessary.

"If the jury believe from the evidence that the defendant was placed in a position at the time of the killing in which his life was imperilled by the deceased, and he slew him without having any notice of his official character, or any reasonable ground to know of his official character, and the killing was apparently necessary to save his own life, then the killing of the deceaaed was homicide in self-defense; nor does it matter that the deceased was legally seeking to arrest the defendant if defendant had no notice of the fact or no reasonable ground to know that he was an officer."

293 It is not necessary to know that it was Floyd Wilson, but an officer.

"But if the defendant prevented Floyd Wilson from giving notice of his character or mission by threatening and violent conduct, then of course he would not be required to give the notice. He can stand, as upon the other proposition, on the defensive.

These propositions are given on the theory that *if* you believe that no proclamation was made. If a proclamation was made then the defendant had express notice, he had positive notice of it."

"It is the duty of every citizen to submit peaceably to a lawful arrest, but he is under no obligation to submit to arrest unless he knows or is notified of facts which justify his arrest:" Provided he does not by his violent and threatening conduct prevent the officer from making known his character and mission, or he had no reasonable ground to know what his mission was.

"If a man has reasonable ground to know a thing, then he must exercise the faculty that belongs to him in order that he may have actual knowledge. If there are such reasonable facts offered to your mind as to produce certain conclusions, you as reasonable men arrive at that conclusion; that is exactly the duty that is incumbent upon every man. Therefore, to make an arrest lawful it is necessary that the person arrested should have notice that he is arrested by lawful authority, unless he have reasonable ground to know the condition, or did know it." The notice need not be given him at all if he knew the condition. This is provided he does not prevent the giving of such notice by his resistance, or threatened

294 violence.

These are the propositions that are given in connection with the other part of the charge.

There are some other things, gentlemen, that I might detain you on, but I will not do so. I say to you in conclusion, as the law says to you, because I am only its mouthpiece, I do not make any law; it is all given to me here to declare to you, and you take it as I declare it; you find the truth and make your application of that principle to the truth; after you

have heard the law as I have given it to you, and the evidence as coming from the witnesses, if you are satisfied as twelve intelligent, dispassionate citizens, sitting here ministering at the altar of justice, in its temple, you are able to say beyond a reasonable doubt that this defendant is guilty of having committed the crime of murder your duty as men, and as citizens, and jurors is so to say so, because when you are doing that you are but upholding the dignity, the power and supremacy of this protecting ægis, which is our only safeguard, our only protection, and that by which the rights of the citizen are protected, by its enforcement by judicious, proper, faithful, and brave officers. Without these officers what is the use of this court? It takes men who are brave to uphold the law here. I say, because of this, and because there is no protection unless the law is upheld by men of this kind, if it be true that you are satisfied of the fact beyond a reasonable doubt that Floyd Wilson was a man of this kind, that he was properly in the execution of the high duty devolving upon him, and while so properly executing it by the light of these principles of the law I have given you, his life was taken by this defendant, your
295 solemn duty would be to say that he is guilty of the crime of murder, because if the law has been violated it is to be vindicated; you are to stand by the Nation; you are to say to all the people that no man can trample upon the law wickedly, violently, and ruthlessly; that it must be upheld if it has been violated.

On the other hand, if the case is not carried to that point where you are satisfied beyond a reasonable doubt that the defendant is guilty of this charge, or guilty of either one of these charges that I have defined to you, your duty would be, as a matter of course, to acquit him, because you would then be upholding the law.

You all know what is meant by proving a state of case beyond a reasonable doubt. It means when all the evidence when considered in the light of the law that I have given you carries your minds to that point that you are compelled to say you have an abiding conviction to a moral certainty of the truth of the charge—that means, that if you would believe this charge as proven if it was presented to you as twelve reasonable citizens outside of the jury box, bearing in mind your duty to the law and to your country and to the defendant, and to the dead—bearing in mind all these things, you would be satisfied as twelve reasonable men that this case was proven so that you would act upon that conviction, and take whatever action duty called upon you to take, then it is proven beyond a reasonable doubt, because it is so proven that reasonable men believe it. That is the degree of certainty that must be attached to a proposition when it is presented before you in the jury box. If it has been estab-
296 lished to that extent by the light of this evidence, and by the light of this law I have given you, I say to you to convict this defendant. If it has not been established to that extent, I say to you to acquit him.

I entrust the case to your hands with the abiding conviction that you will stand by the law; you will see to its vindication; you will maintain its supremacy; you will uphold its dignity; you will do that which as good men, as good citizens, duty calls upon you to do, and when you do that, and your minds are directed by the light of this law and this evidence, and when you have come to an honest and conscientious conviction beyond a reasonable doubt, acted upon it, and promulgated it, you will have done your whole duty.

Gentlemen, you will retire to consider your verdict.

Mr. CLAYTON (of counsel for defendant). Before the jury retires, I believe the law requires our exceptions to be filed to the charge of the court?

The COURT. Yes; let them be filed.

297 Whereupon the defendant at the time excepted to the charge of the court, which exceptions were as follows to wit:

1. Object to criticism of the court on robbing one of life.

2. If deft. fires at a man and the man is killed the law presumes he intended to kill and he is not permitted to contradict that presumption.

3. On definition and instructions as to meaning of term wilfull.

4. When killing was done wilfully and the circumstances do not show it was excusable or justifiable then the element of malice aforethought springs into the case.

5. Instructions as to malice aforethought.

6. Instructions as to general ill will or spite or grudge or hostility against officers obstruct.

7. When a man forms a deliberate design to kill another that imports malice aforethought.

8. On the instructions as to the improved implements for taking human life.

(Comment.) The more quickly a human life may be taken with the improved instruments the more quickly may the defendant resort to his defense.

9. If the defendant had the previously formed design to resist arrest and in doing that he took the life of Floyd Wilson, he killed him in doing an unlawful act and the law would denominate it murder.

10. Self-defense must have or come with clean hands and pure hearts.

11. Generally as to the law of self-defense, and particularly as to the duty of the defendant to surrender to Wilson to avoid any further conflict, &c.

298 12. If a man goes to a place for the purpose of provoking a difficulty he cannot invoke the law of self defense and the comments on that subject.

13. Instructions as to the condition of that country being a Golgotha and comments in that connection.

14. What is a violent demonstration and instructions in that respect.

15. If defendant was defying the officer by words the officer would from that time (Sec. 2153) stand on the law of self defense.

16. As to instructions that Dickey was a deputy marshal and was duly commissioned.

17. Instruction that Wilson was in the presence of the officer.

18. The instruction as to manner of making arrest and ridiculing manner of arrest, which manner have never been claimed by deft. or his counsel.

Sec. 5389.

19. As to power. privileges, and rights of officers in making arrests.

20. The officer may overcome by deadly violence if he is hindered, impeded, or delayed.

21. As to instruction as to rights and conduct of the officer at Lipsies' house.

22. If making his business known would imperil the life of the officer he need not make it known.

23. When resistance is offered and he officer kills it is justifiable, and the officer is killed it is murder.

24. If he bids defiance to the officer he would be guilty of a violation the law, and Wilson would have the right to fire on him.

299 25. In case of an escape or resistance officer would have right to take life.

26. He was a fugitive from justice if he had jumped a bond in the court, &c.

27. As to comments on the Government witnesses, Dickey and Mrs. Padgett.

28. You are authorized to believe what the defendant admitted against, disbelieve that in, his favor.

Defendant objects to the following in the charge of the court:

1st. First we must be doing what we have a right to do; we must be in the right before we can invoke the law of self-defense.

This contemplates that the defendant was in the right; that he was doing what he had a right to do.

2nd. If a man is at a place armed and equipped to resist process the officer has a right to invoke the right of self-defense, and the defendant is cut off from it.

3rd. What a shame, what a crime it would be to send the officer out into that Golgotha to make arrests that the man committing crime could injure, could threaten, and the officer could have no redress.

4th. If the deft. was prompted to carry his arms to prevent arrest then he is in the wrong, and a conflict ensues in which he takes the life of the officer, he engages in a conflict that cuts him off from the law of self-defense, and he is guilty of murder, and that is all there is to it.

5th. Counsel for defendant asks you, I believe, to give some meed of praise to deft. for his conduct. The law don't require you to do that.

300 6th. Sec. 2153 given in charge when it is not applicable, because Wilson not employed in conformity with it.

Not necessary to get persons out of Indian country, if Wilson summoned in the Ind. T. not material although statute requires them to be employed in the States.

7th. According to this law (2153) Wilson was near enough to the deputy to be considered in his presence.

8th. That the court, after reading the writ issued by Stephen Wheeler and not under seal, said that this is a legal writ.

9th. "The law says first take your man in custody and then inform him of your authority. Then the officer is to explain to him his authority and the cause of the arrest."

10th. In order to execute a criminal warrant or to arrest for felony on reasonable suspicion, or to quell an affray then in progress, an officer has the right to break open the outer and inner door of a house to affect an arrest, and the officer is justified, even though it should turn out that the person sought is not in the house at the time, for the officer has the right to search there."

His duty to demand admittance and explain the purpose of his entry not given, in connection with this charge.

11th. He, the deft., was a fugitive from justice if he had jumped a bond in this court.

12. Mrs. Padgett is not to be disbelieved because she is denounced as a Judas.

It was her duty to inform the officers of his whereabouts, &c.

13. Whole charge objected to because it is argumentative.

15. Exception to modification of Instruction No. 1 asked for by defendant.

301 16. Exception to modification of instruction No. 2 asked for by deft.

17. Exception to modification of instruction No. 3 asked for by deft.

18. Exception to modification of instruction No. 4 asked for by deft.

19. Exception to not giving all and each of the instructions asked for by defendants without modification.

These were all the exceptions to the charge of the court that were taken at the time the charge was given and presented to the court in the presence of the jury.

The jury then retired to consider of their verdict, and after being out a short time returned into court the following verdict:

"We, the jury, find the defendant, Henry Starr, guilty of murder, as charged in the within indictment."

(Signed) JOHN H. NORRIS,
Foreman.

The defendant then filed his motion for a new trial, which is in words and figures as follows, to wit:

302 *Motion for new trial.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF,
vs.
HENRY STARR, DEFENDANT. } Murder.

The defendnt, Henry Starr, moves the court to set aside the verdict of the jury heretofore rendered against him in the above-stated cause and grant him a new trial, and for cause shows:

1. That the verdict was contrary to the evidence.

2. That the verdict was contrary to the law.

3. That the court erred in excusing from service on the jury, for cause, over the objection of the defendant, James Bill, Simon Severe, and Thomas W. Hamlin, who were qualified jurors to serve in the cause.

4. That the court erredc in refusing to sustain the defendant's objections to Edward Taylor serving on the panel, and declared by the court to be a competent juror.

5. That the court erred in admitting in evidence the warrant of arrest purporting to be issued by Commissioner Wheeler for the arrest of Henry Starr, Edward Newcomb, Jesse Jackson, and Ben Benjamin, dated 13th of November, 1892.

6. Because the court erred in permitting the district attorney to ask the Government witness Arthur Dodge, over the objection of the defendant, the following question: "I will ask you if he did not state this, in order to refresh your memory; did he not state to you, 'I hated, like hell, to have to ride your horse off, but could not do any better; I was
303 afraid the the whole damn country was alive with marshals; I took you and Miller to be United States marshals?'" And in permitting the witness to answer the question as follows, "Yes, sir." And also the following questions by the district attorney and answer by witness:

"Q. I will ask you if he did not say this in addition: 'After this, I don't want you to let any other damn marshal get on your horse as long as he lives; your horse is what fooled me; I thought it was some of your boys coming out there.' I will ask you if he said this in addition: 'That is what fooled me; I never knew any difference until he got pretty close to me?'"

"Answer. Yes, sir."

7. Because the court erred, to the prejudice of the defendant, in refusing to give instructions number one (1) asked for by defendant.

8. Because the court erred in refusing to give instructions numbered 2, 3, and 4, as asked for by defendant.

9. Because the court erred in adding to and modifying instructions 2, 3, and 4, asked for by defendant.

10. That the court erred in its instructions to the jury in this: 1st. Because the court erred in declaring to the jury that "the defendant asserts that he is guilty of nothing; that the law protects him; that he stood within the law and within its protecting power when he took the life of Floyd Wilson. If that be true according to the terms of the law, then he is entitled to this protecting power. If it be not true, he stands without the pale of the protection of the law, which may be thrown around a man under certain circumstances and give him the right, even as a private citizen, to take human life" (p. 2).

2nd. Because the court erred in saying to the jury: "You are to see to it whether this vital, living sign of this great protecting
304 ægis, called the law of this goodly land, in the shape of its officer, under the circumstances and facts in this case, was entitled to the protecting power of the law of self-defense. Because if he was in the right in the execution of his duty; if he was performing that which I didn't command him as judge of this court to perform, but which the chief executive officer of this nation, whose headquarters are at the capitol of this country, commanded him as one of his subordinates to do—if he was right in the method he adopted in doing it, then he is surrounded by the whole power of the law of self-defense" (pp. 2, 3).

3rd. Because the court erred in saying to the jury: "The very nature of the defense of this defendant impliedly admits that Floyd Wilson is dead, that he died by violence of the character named in the indictment, and that the defendant inflicted that violence upon him" (p. 5).

4th. Because the court erred in saying to the jury: "There are certain other elements which enter into that act which must be taken into consideration by you to enable you to characterize the killing, to say whether, under the law I am about to give you defining this crime or the elements entering into it, it possesses these attributes which makes it the crime of

murder—the highest crime practically known to the law of this country, the crime that is practically of the most serious import known to the laws of this country, the crime which takes away the support of a family, which robs the innocent individual citizen of that which he has no right to be robbed, and that which he does not forfeit under the law except by his own conduct and when the law says he shall forfeit it" (p. 6).

305 5th. Because the court erred in saying to the jury: "Now, that is what is meant, in short, by a man's killing another intentionally. He presents the gun at him and he fires it at him within shooting distance; the man is killed. You have the facts which ordinarily and usually convince a reasonable man that he intended to kill—that he intended to take life. He is not permitted by the law to forget that proposition, because there is flowing, in the estimation of the law, naturally, reasonably, and probably, from his act a deadly result—a deadly consequence—that the law holds him to have intended" (p. 10).

6th. Because the court erred in saying to the jury: "It goes to characterize the condition of the mind, and it goes to enable intelligent minds to know what the party contemplated—what he intended when he was doing that act—and that contemplation can only be found only from circumstances—that is, by the nature of the act done, and the way it was done, and the character of the weapon used, as I have told you, bearing in mind that the law holds every man to know the nature of the weapon that he uses, the purpose for which it was constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion. For that reason, when a man presents a gun or pistol at another and shoots it at him the law says that he intends to kill, because the killing is a result that is natural, or probable, or reasonable" (p. 11).

7th. Because the court erred in telling the jury that in determining whether the defendant shot the deceased willfully or not they
306 should look at the result produced by the shooting, look at the character and number of wounds upon the person of the man killed.

8th. Because the court erred in instructing the jury as to the meaning of the term "wilful."

9th. Because the court erred in saying to the jury that "If you are satisfied that this killing was done wilfully, and I want you to note the terms I am about to use, done wilfully and done in such a way as not to be justifiable under the law of self-defense, and done in such a way as that there are no mitigating facts in it to reduce the grade of the crime; if the evidence shows that it was done wilfully, and done without justifiable cause or in the absence of mitigating facts, the law says it was done with malice aforethought; and the establishment of the proposition that it was done wilfully, and the banishment from the case the other proposition that it was not done under the law of self-defense, or that it was not mitigated under the law so as to reduce the grade of it, leaves the killing in the condition where malice aforethought springs into existence from the party having done the wilful act. There are but three conditions growing out of homicide under American law—I do not mean the law of the States, I mean the law of the United States; one is a condition where the act is no crime at all, because excusable under the law of self-defense, and the other

is condition where the crime is of a less grade, and where the killing is not characterized by wickedness, brutality, or savagery, and is called manslaughter. If the condition which is known as the condition of self-defense does not exist in the case, and if the condition which is
307 known as the condition of manslaughter does not exist in the case, the only sensible conclusion we can arrive at by eliminating these two propositions from the legal equation is to find that there is the only remaining proposition in it, and that is the proposition known as murder." (12, 13.)

10th. Because the court erred in instructing the jury as to the law of malice aforethought.

11th. The court erred in saying to the jury, "But when a man contemplates taking another's life without its being necessary to defend himself, he can not set up anything, even in mitigation of an act of that kind; because this element of murder, known as malice aforethought, exists, which grows out of a state of premeditation, a state of case where he thinks of it beforehand, and if he thinks of it beforehand and kills in such a way as that the act of the killing can not be mitigated or justified, the fact that he thought of it beforehand, the fact that he prepared to do it beforehand shows that it was done deliberately—that it was done with premeditation, and it consequently grew out of a wicked condition of mind, a mind that entertained a purpose to produce a deadly result without just cause or excuse, or in the absence of mitigating circumstances."

12th. Because the court erred in saying to the jury, "When a man forms a deliberate intent to kill another, that is malicious killing."

13th. Because the court erred in saying to the jury, "I state this to show you how rapid the human mind can act; and in this age—an age when we have weapons of destruction brought to such perfection that in the twinkling of an eye a heart's blood is let out, that in the
308 twinkling of an eye a thought to destroy human life is conceived and executed; I say in this age, when we have such elements of destruction and when so many men have forfeited their innocent lives because of the reckless and wicked use of these elements of death and destruction to life, because of the ease with which they can be used and the rapidity with which the deadly, hissing, burning missile can reach the vitals of its victim, it is important for us to note this fact, that the human mind is capable of such rapidity of thought that it may conceive a deadly purpose and then and there contemporaneously, apparently, and practically with the conception of it may execute it, and yet when that is done, the conception of the purpose to kill was without justifiable cause, or in the absence of mitigating facts; it is premeditated in the law; it is thought of beforehand."

14th. Because the court erred in saying to the jury that "though the law requires premeditation, the thought to kill must be contemplated beforehand, yet the contemplation of it may be cotemporaneous with the execution of that thought" (p.).

15th. Because the court erred in saying to the jury that "malice is an intent of the mind and heart, the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act, or which reduces the grade of the crime. Whenever a wrongful act is done with-

out just cause or excuse, and in the absence of mitigating circumstances, which produces death, it is murder, whether it grows out of special spite or animosity, or a specified design to take life, or the purpose to do some other act of a wicked and malicious and criminal nature, which, because of its nature and the way it is done a human life is taken, malice aforethought exists, because that is the doing of a wrongful act or excuse which results in murder. It evinces a formed design to do such
309 mischief as may deprive a fellow-being of life" (p. 23).

16th. Because the court erred in saying to the jury: "For example, having reference to the latter part of the sentence I have just given you, if this defendant formed a design to resist the execution of legal process upon him, he had in contemplation a purpose to resist it by armed violence, if occasion offered and occasion did present itself, and in the execution of this purpose, of this previously formed design to resist this execution in a proper way of this process of this warrant, and took the life of Floyd Wilson, then he is in the attitude of doing a wrongful and unlawful act, and by executing it he takes a human life, and when he does that wrongful act in that way, in that illegal and improper way, as you may see it after you have heard the law defining the rights and duties of officers and citizens, and he contemplated a purpose to do that, and he was going about the country armed for the purpose of resisting arrest that was to be properly executed upon him, and then he takes a life in pursuance of a previously formed design to do an act which may produce a deadly result, the law says that there is a crime. It says that if men form an intention of doing such a thing, and they seek to do it, and in execution of it they take a human life, they may have had no specified design to kill, but if they had a design to do these other things that I will name presently, and in the doing of those unlawful things they take a human life, the law says it is murder" (pp. 23, 24).

17th. Because the court erred in instructing the jury that "if a man enters upon the purpose of resisting the execution of legal process, sought to be executed in a legal way, he enters upon the doing of that which may produce death, which may cause the destruction of human life,
310 because, as I will show you further on, at that stage of the proceedings of that character the officer has belonging to him certain great rights; yea, I will classify them more correctly. There is devolving upon him embodied in this great command that I will read to you presently great duties, and a human life may be destroyed by his failure to observe them, and when a purpose is formulated to resist arrest that may be sought to be executed in a legal way, and the party prepares himself for that by arming himself with a Winchester and a pistol, marching about the country preparing for the onset, if the occasion offers, and because of that he takes the life of the officer, he is then committing an act which results in death growing out of a premeditated purpose to do an act which indirectly endangers life, and because of that he would be guilty of murder, though he might not have any specific intent against the officer other than to resist by violence the legal execution of legal process by him. It is, therefore, necessary that you should note this passage which I have given you" (pp. 25, 26).

18th. Because the court erred in saying to the jury: "Anything that shows deliberation, anything that shows premeditation, a premeditated

purpose to do a wicked or wilfull act that might result in death, is a fact that may be considered by the jury going to show the existence of malice aforethought" (pp. 27, 28).

19th. Because the court erred in saying to the jury: "Therefore there is an absence from the case of that state of facts which goes to show that the party had a right to do what he did do. The law lays it down that the deliberate selection and wrongful and unlawful use of a deadly
311 weapon shows premeditation, shows that the act was thought of beforehand, and whenever a party, entering upon what unlawful or criminal enterprise he may enter upon, prepares himself with a deadly weapon for the purpose of using it in a wicked or unlawful way, the fact of so preparing the weapon and selecting it for use in that unlawful and wicked way, in a way not authorized by law, in a way that the law would not mitigate the act if done—I say, the fact of the selection and preparation of a deadly weapon and the use of it in an unlawful and deadly way after he has so selected and prepared it shows the existence of a state of premeditation, shows that he thought of the purpose to kil' wrongfully and unlawfully before he executed it, and when that state of case exists there is a condition of malice aforethought which goes to characterize the act as done" (p. 28).

20th. Because the court erred in saying to the jury: "Look at the manner of the shooting, the time of the shooting, the very nature of the wounds, and their very number, and under what circumstances they were inflicted" (p. 30).

21st. Because the court erred in instructing the jury as to the law of self-defense.

22nd. Because the court erred in saying to the jury: "The fact that we love to sleep in quietude and in protection beneath our rooftree, in the presence of our own family altar in the nighttime, commands us to uphold this mighty power which walks in grandeur and majesty throughout this land and surrounds every house and says to every assassin, to every burglar, to every murderer, 'Thus far and no further.' It is a great and mighty power, and for the maintenance of which governments are instituted. This mighty power that so protects all the innocent is but the will of this
312 great people, their expression in legal form, prescribing a rule of action binding upon all, commanding the respect of all, and beneath it all must bow, and in this government of the people and by the people the law is the mandate to which we must bow; the law is the supreme ruler. You then in this case must solemnly, deliberately, and dispassionately and reasonably look at these facts to see whether the power and majesty and dignity of the mighty protecting agency has been trampled upon ruthlessly and wickedly and with malice aforethought by this defendant, by means of which act a man has been robbed of his life, if that be the true condition" (p. 31).

23rd. Because the court erred in saying to the jury: "If we have created a condition that leads to a deadly result, the law of self-defense does not apply to it; if we create that condition by doing a wrongful thing upon our part which would naturally or reasonably or probably produce a deadly result, the law says there is not self-defense for us, because we are in the wrong in the first place, and especially does that principle apply to a case when we are doing an act which from its nature and the way we

are doing it, death would be naturally produced in the conflict that may ensue because of the act that we do. I say, then, we must enter upon the execution of this grave act upon our part with clean hands and a pure heart, or, as the law expresses it, we must be in the lawful pursuit of our business" (p. 33).

24th. Because the court erred in saying to the jury: "Now, let us see again by enumerating each condition that must enter into what they are. First, we must be in the right; we must be doing what we had a right to do at the time of the killing, and when we are so situated we are
313 attacked by another. How? What sort of an attack? Why, under circumstances which denote from the character of the act, and the way it is done an intention to take away our life or do us some enormous bodily harm under such circumstances, provided still we did not bring on the conflict by a wrong upon our part which would necessarily and naturally precipitate it; under such circumstances we may lawfully kill the assailant, provided we use all the means in our power otherwise to save our lives, such as retreating. That is what the law says. We frequently hear it in argument, that it is not manly; it is not manly to save human life when we can do it; it is not manly to obey the Golden Rule; it is not manly to obey the laws of our country when they say in thunder tones everywhere that before taking human life, though the man whose life is taken may be in fault, we must do everything that we reasonably can to prevent that last resort, that last thing we can flee to. We must avoid the necessity for it if we can" (p. 34).

25th. Because the court erred in saying to the jury: "Now, in this case, this contemplates as far as this case is concerned, that at the time that Floyd Wilson was killed that this defendant was in the right; that he was doing exactly what he had a right to do, and when so situated he was attacked by Wilson in such a way as to indicate a deadly purpose upon his part. About that there can be no question—that is to say, if Wilson shot at him, shooting at a man is evidence of a deadly purpose, and when that transpired if he could not by the exercise of any other reasonable means, or the doing of any other reasonable act, such as surrendering to the officer, such as by his action taking away the necessity of exercising of
any more force, that he could not do that and stop the difficulty, or
314 that he could not do it by exercising less violence than he did exercise he could kill Wilson; but there must be an absence from the case of these propositions before this principle of the law of self-defense can be applied at all to the case. He must be in the right. He must be doing what he had a right to do. We will see after awhile whether under the law his position was of a character that he was in the right, that he was doing what he had a right to do, and that Wilson wickedly, unjustifiably, without reasonable cause, attacked him in such a way as to jeopardize his life, and that he could not escape from that danger except by taking his life" (pp. 34 35).

26th. Because the court erred in instructing the jury: "He may lose that right by his own bad conduct, because the law says he must be in the lawful pursuit of his business; he must be in the right; if he creates a condition by his own wrongful act, if he brings into condition such a condition upon what principle of right could he invoke the law of self-defense when he has created the very condition that he now invokes. For instance

among other things, is this: If a man goes to the place where the slain person is, or if he is at that place, with a deadly weapon, for the purpose of provoking a difficulty, or with the intent of having an affray, he can not invoke the law of self-defense, because he has no right to do that. If he is at that place, and while there he is prompted by a design to do that which the law forbids his doing—obstructing or hindering or intimidating the execution of lawful process by the exercise of force or violence of a dangerous character to the life of the officer—that is a crime under the laws of the United States.

315 If he is there armed and equipped for that purpose, and he is in that position, prompted by a design of that kind, and that is made manifest to the officer, then the officer has a right to invoke this right of self-defense from the time that condition springs into existence. This law of self-defense did not belong to the defendant alone, but it belonged to Floyd Wilson as well as to the defendant, and it was thrown around him as an officer to the highest degree, providing he is in the proper exercise of his duty. It surrounds him at the time and at the place where he enters upon the performance of his duty; from that time he is panoplied with the whole power of the law of self-protection, of self-defense. How xnjust, how cruel, what a mockery, what a sham, what a bloody crime it would be upon the part of this Government to send a man out into that Golgotha to officers, and command them in the solemn name of the President of the United States to execute these processes, and say to them: Men may defy you; men may arm themselves and hold you at bay; they may obstruct your process; they may intimidate your execution of it; they may hinder you in the arrest; they may delay you in doing by threats of armed violence upon you, and yet I am unable as Chief Executive of this Government to assure you that you have any protection whatever. It is for you, gentlemen of the jury, to say whether the rule invoked by argument in the defense as to the character of these laws, and as to the rights and duties of these officers, is the law of this case, or whether it is to be found as declared by the solemn declaration of this great compact in the shape of the laws which binds the people of this country together, and which makes them a harmonious, united, and common people, harmonious and united in their desire to uphold and enforce the law against all violators and all offenders of it.

316 "Then, I say to you in this case, that if this defendant was at that place, or he was going about the country there, and happened to be overtaken by these officers armed, and went armed there for the purpose of resisting the process of the law that was sought to be properly executed against him, if that was what prompted him to carry these arms, if that was his object, if that was why this conflict sprung into existence, then he engages in a conflict which he precipitates by a violation of law upon his part, by a design to trample upon the law, by a design to set it at defiance, by a design to bid defiance to all the law and all its rights and all its power, when he does that, and if while doing it he undertakes to execute a wicked and unlawful purpose of that kind, and a conflict ensues in which he takes a human life he is guilty of murder, provided that officer was in the lawful exercise of his duty. He is guilty of murder and nothing else" (pp. 38, 39, 40).

27th. Because the court erred in instructing the jury as to the law of manslaughter, and in saying to the jury: "Now, it may be proper in this con-

nection before going further that I say to you there is a crime under the law—and it is embraced in this indictment—which is called the crime of manslaughter, which is of less grade, of less magnitude, of less wickedness, than the crime of murder, because there is out of it this terrible black *black* thing called malice aforethought; this wicked thing which corrodes the heart and corrupts, yet controls, the mind. There is out of that crime, there is not in it at all, that element, because the law of the United
317 States says that whoever kills another wilfully and unlawfully, without malice aforethought, is guilty of the crime of manslaughter. I give this to you; it has not been asked by the defendant. They say their client is guilty of nothing at all; they asked you in the argument, I believe—one of the gentlemen, when you acquitted him—to give him some me*ad* of praise for his act. Well, the law does not require you to do that, and you had better stop with exercising your legal duties; perform your legal duty and go no further. There may be a state of case to which you can apply the crime of manslaughter. That is for you to say; not me" (pp. 40, 41).

28th. Because the court erred in saying to the jury: "Do you have to wait until the gun is presented at you? What security to life against these deadly weapons would men have if this was so? Do you have to wait until the gun is fored? A violent demonstration which amounts to an assault with intent to kill, with a Winchester or pistol, may be made far short of that. If a man is making a demonstration with his gun and has gone far enough to show a purpose from the way he is handling it, from what he may have said, from his actions, a purpose to use it upon his adversary, then the man upon whom he is endeavoring to use may stand upon the defensive, and especially is that true with reference to an officer in the exercise of a duty he is commanded to perform. So, in this case, if this defendant was making a demonstration with his Winchester or pistol, that from its character, or from what he said, if it be true, if you find from the evidence that he was defying the officer after he demanded his surrender, or told him he had a warrant for him, if he was defying him by making a violent demonstration with the weapon, going sufficiently far with it to indicate to a reasonable man that his purpose was then and there to put
318 it in a position to use it, the man who stood opposite him as an officer from that time stood upon the defensive—he stood upon the defensive all the time, before that, in going to that place, and it remained with him as long as he was in the right" (p. 41–42).

29th. Because the court erred in saying to the jury: "To assist in executing process by arresting prisoners. He has full power, full authority, especially in a case like this, when he was as one in the immediate presence of his chief, as the evidence shows he was of Dickey; they were both there together." (P. 45.)

30th. Because the court erred in saying to the jury: "Wilson and the officer then had legal authority to enter upon the mission they did enter upon; and what was that? What was the posse to do? What was he commanded to do? To go into the Indian country and hunt up Mr. Starr, and say to him that on a certain day the judge of the Federal court at Fort Smith will want your attendance at a little trial down there where you are charged with horse stealing and you will be kind enough, sir, to put in your attendance upon that day; and the judge sends his compli-

ments to you, Mr. Starr: Is that his mission? Is that the message from this court to be handed to Mr. Starr upon a silver platter with all the formalities of polite society? Is that what Floyd Wilson was employd or engaged to do?"

31st. Because the court erred in saying to the jury: "They were, then, lawfully commissioned, and they had a right to execute that paper, and they had a right in a legal and proper way to overcome all opposition to the execution of it; and you will bear in mind that under the laws of the United States it is a crime for a person to interfere with the
319 execution of papers of that character, for the law says in section 5398 Rev. Stat. that—

'Every person who knowingly and wilfully obstructs, resists,' or opposes any officer of the United States in serving, or attempting to serve or execute, any mesne process or warrant, or any rule order of any court of the United States, or any other legal or judicial writ or process, or assaults, beats, or wounds any officer or other person duly authorized in serving or executing any writ, rule, order, process, or warrant', shall be punished, etc." (Pp. 46–47.)

32nd. Because the court erred in instructing the jury as follows: "Now, it is not necessary that he should make proclamation that he is Smith, or Jones, or Floyd Wilson; he must say that he is an officer, or that he has a writ, or something to indicate that he is an officer. If he says 'hold up, I have a writ for you, or a warrant for you,' that implies that he is an officer, that he has official authority, because if he is a citizen, though armed with a writ, he can not execute it under the law; he could not be anything but an officer with a paper of that kind in his possession. And if his chief had a paper, if Mr. Dickey had a paper in his possession, and at the distance where this killing occurred from where Dickey was Wilson made the proclamation that 'I have a warrant for you,' or 'a writ for you,' he was not required to go any further than that at that time." (P. 48.)

33rd. Because the court erred in saying to the jury: "When a man stands with his gun in his hand, and his pistol in his belt, and the officer commands him to surrender, or to hold up, and he says to the officer, 'You hold up,' with his gun in a threatening position, if that be the atti-
320 tude of it, the officer is not required to show his authority; he has no time to do it, because the law says to him, that from the time he enters upon this mission he has the law of self-defense in his favor and his behalf, and that he has a right to invoke it as long as he is in the right; it says to him, you have a right to stand upon it to watch for your safety and your security, because although this Government sends you upon a dangerous mission, it undertakes to protect you as long as you are in the proper exercise of your rights or execution of your duties." (Pp. 50-51.)

34th. Because the court erred in saying to the jury: "If the defendant did that which obstructed it, which impeded it, which hindered it, which delayed it, he was in the wrong and the officer was in the right, and if the act of obstruction was being wilfully done and intentionally done, that act of hindrance, or the act of delay was by a threatening position of a dangerous weapon, then the officer had a right to so far stand upon the defensive as to do that which was necessary to overcome that obstruction, because he is commanded to execute this paper, and if the party offers

resistance, and if that resistance is of a dangerous and deadly character, the officer can overcome it by an act of deadly violence if the party is seeking to obstruct or to hinder or delay the execution of the process by resistance of a deadly character, and in this way is enabling himself to avoid capture, to get away, to escape, he is doing that which gave Floyd Wilson in this case the right to overcome that obstruction and that resistance that was offered to him in the execution of this process" (pp. 51, 52).

35th. Because the court erred in saying to the jury: "I say when he can with regard to his own safety make his mission known it is his
321 duty to do so, to demand admittance into the house, and if it is not promptly opened, or opened in such a time as he thinks it ought to be, taking into consideration the fact that the party may have a chance to escape by delay, he can break in the door, because it is no longer a sacred castle. It is a place, if he has reasonable ground to believe that the man he is seeking for has taken refuge there from justice, that he has a right to go and arrest him; or, as I repeat again, the power of arrest is a power in the hands of the people so much greater for their safety than the right of any citizen individually that this power can be executed even there" (pp. 53, 54).

36th. Because the court erred in instructing the jury as follows: "The officer, armed with a lawful warrant, or, in making a lawful arrest without a warrant, has a right, and it is his duty, to use every necessary means to make the arrest when the party is charged with a felony; if it is resisted he may use force, and such force as is necessary to overcome the resistance, even to the taking of life. In such a case if the person resisting is killed by the officer it is justifiable homicide" (p. 54).

37th. Because the court erred in saying to the jury: "Is it necessary for the officer to wait until the man he is seeking to arrest points his gun or pistol at him? If he bids defiance to the officer, if he is handling his gun in a threatening way as if he intended then and there to use it, putting it in a threatening attitude, he would be guilty of an assault with intent to kill at that stage, and the officer would have a right to overcome that force by an act of violence that would destroy his life if he could not overcome it by any other reasonable means. And if that was the
322 condition as existing between Floyd Wilson and this defendant, then Floyd Wilson had a right to fire upon the defendant if he stood the authority of Wilson at defiance, after knowing that he was an officer by proclamation, or from good reasons and grounds he could have known it—and it was not necessary that he should know it was Floyd Wilson; if he knew he was an officer, from the actions and declarations of that officer, or from other facts and circumstances such as that he was looking out for officers, such as that the actions of the man were in harmony with the actions of an officer who was seeking to arrest him, he would have this fact brought to his mind by reason of these facts and circumstances, and it is your duty to find out whether he knew or had good ground to know as to what the purpose of Floyd Wilson was at that time, and just what attitude he put himself in, what was his condition at that time. If he was seeking to escape, knowing the officer's mission, or having good grounds to know it, he was seeking to avoid that arrest, to stand the officer off until he could get away, then the law says that in the execution of this process if the officer could not capture him in any other way he had a right to take his life" (pp. 55, 56).

38th. Because the court erred in saying to the jury: "In case of resistance the thing exists then and there, and it threatens the execution of the process, and it threatens the life of the officer and is of a deadly character, and it is of that nature that the officer has a right then and there to act. The officer has a right to then and there act, if that be the condition, to
the extent, if necessary; provided he can not execute the process
323 or turn aside the danger to himself in any other reasonable way;
he has a right to act even to the extent of taking the life of the party who is resisting" (p. 57).

39th. Because the court erred in saying to the jury: "He was a fugitive from justice if he had jumped the bond he had in this court, as they say; if he had forfeited his bond, and was up in that country hiding out away from his usual place of abode to avoid arrest, he was then a fugitive from justice, and you have a right to take that condition into consideration" (p. 61).

40th. Because the court erred in saying to the jury: "You have a right to stand upon the defensive as long as you are in the right, and when your process is sought to be obstructed or impeded, or you are hindered in the execution of it by violence of a deadly character, you can overcome it by death to the party who obstructs or impeded the arrest if you can not destroy it in any other way, providing the crim' h' is seeking arrest for is felony."

41st. Because the court erred in saying to the jury: "If the man you are seeking to arrest sets your authority at defiance, heaps indignity upon you by holding you at defiance, when you are armed by the power of the law, you may overcome that condition by the use of such force as is necessary, even to the extent of taking life, if that act of threatened violence be of a dangerous or deadly character" (p. 63).

42nd. Because the court erred in saying to the jury: "You are to see what did occur; what was the final result; see what all the facts and circumstances surrounding the case were, and if you are satisfied beyond a
reasonable doubt that the condition is established that under the
324 definition I have given you is murder, your duty is to say so,
because if that does exist it is not only the life of Floyd Wilson that has been taken, but it is the power of the law that has been set at defiance; and although the taking of the life of Floyd Wilson in a murderous and wicked way is a great and high crime, the crime of setting at defiance the law of this country which protects every good citizen, and it is even a higher crime than the loss of that citizen's life" (pp. 63-64).

43rd. Because the court erred in saying to the jury: "The fact that a man is in the employof an express company is no reason why you should disbelieve him, and his testimony is not to be set aside by abuse hurled at him, or sneers at his expense. It is to be regarded in the law solemnly and dispassionately, weighed justly and impartially. If it is not true when you look at it in the light of its reasonableness and consistency and probability, you discard it; but if it is true, this man, instead of being derided, instead of being abused, the officer who attempted this process is to be commended for it, because it is upon the execution of the law that we all depend for safety" (p. 64).

44th. Because the court erred in saying to the jury: "Now, again, this woman's (Mrs. Padget) evidence is not to be set aside because she has been denounced as a Judas Iscariot. That does not impair the truthfulness of any witness's evidence. It is not crime to give information of a man who may be charged with a crime. The law of the United States says that if any citizen knows of the commission of a crime, and conceals it, he is guilty of a crime that may send them to the penitentiary for three years. If these men were seeking to get information of the whereabouts of that man, and this woman gave it, instead of being abused she is to be commended, because it is the duty of every citizen to do it, and it is neither good morals or good law to denounce her for it" (pp. 64–65).

325 45th. Because the court erred in instructing the jury as follows: "I say to you, in conclusion, as the law says to you, because I am only its mouthpiece—I do not make any law; it is all given to me here to declare to you, and you take it as I declare it; you find the truth and make your application of that principle to the truth—after you have heard the law as I have given it to you, and the evidence as coming from the witnesses, if you are satisfied as twelve intelligent, dispassionate citizens, sitting here ministering at the altar of justice, in its temple, you are able to say beyond a reasonable doubt that this defendant is guilty of having committed the crime of murder, your duty as men, and as citizens, and jurors is to say so, because when you are doing that you are but upholding the dignity, the power, and supremacy of this protecting Ægis, which is our only safeguard, our only protection, and that by which the rights of the citizens are protected, by its enforcement, by judicious, proper, faithful, and brave officers. Without these officers what is the use of this court? It takes men who are brave to uphold the law here. I say, because of this, and because there is not protection unless the law is upheld by men of this kind, if it be true that you are satisfied of the fact beyond a reasonable doubt that Floyd Wilson was a man of this kind, that he was properly in the execution of the high duty devolving upon him, and while so properly executing it by the light of these principles of the law I have given you, his life was taken by this defendant, your solemn duty would be to say that he is guilty of the crime of murder, because if the law has been violated it is to be vindicated; you are to stand by the Nation;

326 you are to say to all the people than no man can trample upon the law wickedly, violently, and ruthlessly; that it must be upheld if it has been violated" (pp. 69–70).

46th. Because the court erred in instructing the jury as follows: "I entrust the case to your hands with the abiding conviction that you will stand by the law; you will see to its vindication; you will maintain its supremacy; you will uphold its dignity; you will do that which, as good men, as good citizens, duty calls upon you to do, and when you do that, and your minds are directed by the light of this law and this evidence, and when you have come to an honest and conscientious conviction, beyond a reasonable doubt, acted upon it and promulgated it, you will have done your whole duty" (p. 71).

Wm. M. Cravens,
Wm. H. H. Clayton,
Thos. H. Barnes,
Attys. for Deft. Starr.

327 Which motion was overruled by the court, and in overruling the same the court made the following remarks:

328 In the circuit court of the United States within and for the western district of Arkansas, August term, A. D. 1893.

UNITED STATES
vs.
HENRY STARR. } Murder.

Ruling of the court on motion for a new trial.

Delivered Nov. 4, 1893.

PARKER, J.:

There is a motion pending for a new trial in the case of the United States versus Henry Starr, convicted of murder, which it becomes necessary this morning the court should pass upon.

The causes set up in the motion are comparatively few, although the motion is very long, caused probably by the fact that most of the objections are to the charge of the court. There are some of the objections, however, it will be especially necessary to notice.

The first cause set up in the motion is—

"That the verdict was contrary to the evidence."

I am satisfied that it was entirely in harmony with the testimony, and abundantly supported by the evidence, and that the jury did exactly right in rendering it under the law and the testimony; that they viewed the case after having heard it, and after it was ably presented by coun-
329 sel, and after having deliberated upon it, and having had time to consider it, and I am not disposed to interfere with the verdict of the jury on this ground, as set up in the motion; and this view of the court would virtually dispose of the first and second causes, which is—first, "That the verdict was contrary to the evidence," as I have before remarked, and "That the verdict was contrary to the law."

The third cause is—

"That the court erred in excusing from service on the jury for cause, over the objection of the defendant, James Dill, Simon Sevier, Thomas W. Hamlin, who were qualified jurors to serve in the cause."

The court does not desire to take up time this morning in reading what occurred at the time the qualifications of these jurors were passed upon. It is sufficient to say that as to these three gentlemen, the reasons in the answers given by them were substantially of the same character, and were based upon two propositions, which were, first, an unwillingness to convict in a any case of a capital offense—of an offense where, when a conviction was had, it would be followed by capital punishment; and, secondly, an unwillingness to convict for an offense of that kind when the verdict would necessarily have to be based wholly or in part upon circumstantial evidence. These were the opinions with regard to these matters as given by the three gentlemen when they were being examined touching their qualification as jurors to sit in the case; and without referring to any

law or any authority upon the subject, it seems to me it is only
330 necessary to remark that it is a self-evident proposition that when a juror signifies an unwillingness to convict a man who is charged with a crime of this kind when that crime is to be established wholly or partially upon circumstantial evidence, that such a person is entirely incompetent as a juror, because even the lay mind knows that the very essence, the very substance, of the crime of murder is that which must be proven alone by circumstances; that is, the fact that the killing was done wilfully and with malice aforethought. And when persons entertain an opinion of that kind they entertain an opinion which disqualifies them not only to sit in cases of this character, but in all cases of high crime where the same rule prevails. It is a manifest fact that there is no positive proof of mental condition. You can not tell whether a man does a thing wilfully or not except by extraneous circumstances, by things standing around the act done; and that is in exact harmony with the definition of circumstantial testimony, and the same in regard to malice aforethought.

These same gentlemen made statements as to their conscientious scruples in regard to inflicting the death penalty. They have a right to the opinions they entertain in regard to this method of punishment, and they are not to be criticised for so entertaining them. If it is an honest opinion a man has a right to entertain it. But the statement of these gentlemen as to the possession of these scruples against capital punishment, or against finding a verdict followed by capital punishment, are so positive, so clear, and so conclusive, that no court could have hesitated a moment in passing upon their qualification in a case of this nature. There are declara-
331 tions of the law bearing upon matters of this kind, and it may be well to note them briefly. We shall first refer to the law in regard to the matter of conscientious scruples against capital punishment. Mr. Thompson, in his work on trials, sections 74–75, says:

"Conscientious scruples against capital punishment:

"It is now settled that these are good grounds of challenge in a capital case, without reference to the grounds upon which such scruples arise; though some courts have held such veniremen competent where they were confident of their ability to do justice between the State and the accused, notwithstanding such scruples, but this seems to be an unsound view. This rule of exclusion applies, although the offense is one for which capital punishment may be given, although a lower degree of punishment may be assessed by the jury.

"Conscientious scruples against capital punishment on circumstantial evidence:

"For the same reason the venireman will be excused where he declares that his conscientious scruples against capital punishment are limited to cases in which circumstantial evidence is relied upon for a conviction, since the law recognizes such evidence as of equal value with other evidence, although the particular case depends on direct testimony."

That does not make any difference. The court in passing upon these challenges for cause touching the qualification of the jurors did not know what sort of evidence the case depended upon, and the court has no right to anticipate what may transpire in a case, and to pass upon the qualifica-

tions of jurors in the light of the fact that the case may be sup-
332 ported by positive evidence entirely, or whether it may rest upon circumstantial testimony. A case of this kind can not rest entirely upon positive evidence.

It seems to me that this disposes of the objection urged to the action of the court in excluding these gentlemen from the panel in this case.

There was another objection made, and that was to the action of the court in excluding from the panel the juror Edward Taylor. It is necessary, in order that this record may be made up right, that the court should say a word or two in reference to that. It will be remembered that Taylor was quite closely examined by the district attorney and the court, as well as by counsel for the defense. After he had been pronounced qualified by the court, but before the panel was made up, and before the challenges, either for cause or of a peremptory character, had been completed, the district attorney arose and stated in substance that information had come to him as to the opinion entertained by Mr. Taylor upon the question of capital punishment——

The DISTRICT ATTORNEY. That was not Taylor, if the court please; that was the other gentleman.

The COURT. The record shows, as in their motion for a new trial, that it was Taylor. But I believe that is a mistake. I believe the objection was as to the acceptance of Taylor and as to the exclusion of Mr. Hamlin. Upon examination by the district attorney, by the court, and by Mr. Clayton, of counsel for the defendant, Mr. Hamlin answered conclusively that his opinions upon the question of capital punishment were of such a character that he could not convict in a case where the law fixed the
333 punishment as death. That was the effect of his statement. While the objection was first, apparently, made by counsel for the defense to the examination not being sufficient to disclose his opinion, that position was subsequently shifted and objection made to the action of the court because of the juror being taken at that time. These two positions both appear in the record preserved here. Now, the jury had not been made up, and the challenges, either for cause or the peremptory challenges, had not been completed, and as long as the panel had not been made up and finally passed and completed, it is proper, and within the power of counsel on either side, to make the suggestion to the court, and the court will thereupon pass upon the qualifications of jurors in the light of the facts presented to the court, and I hold that there was nothing improper in that connection.

An objection is made to the acceptance of Mr. Taylor on the jury. In the light of his statements, they showing that he had formed some opinion as to the merits of this case, which opinion he had formed by reading the papers and hearing about the case through rumor, he answering he had formed no opinion—I am giving now a concensus of his answers—that would influence or bias his judgment when he entered upon the trial of this case, I think he was a competent juror. This question has been settled in cases of great prominence in this country, and it has been passed upon by courts of great eminence. Chief Justice Shaw, in the celebrated trial of Professor Webster for the murder of Dr. Parkman, said:

"The opinion or judgment must be something more than a vague impression, formed from casual observation with others, or from reading

imperfect abbreviated newspaper reports. It must be such
334 an opinion upon the merits of the question as would be likely to bias or pervert a candid judgment upon a full hearing of the evidence. If one has formed what in some sense might be called an opinion, but which yet fell far short of exciting any bias or prejudice, he might conscientiously discharge his duty as a juror."

This is from the latter part of sec. 78 of Thompson of Trials. I now read from sec. 79 of the same work:

"Opinions which do not disqualify: Lord Mansfield's standard that 'a juror should be as white as paper' has long since been discarded as impracticable, and that of Chief Justice Marshall, laid down in the trial of Aaron Burr, has been generally substituted in its place. 'Were it possible,' said he, 'to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but that is, perhaps, impossible, and therefore will not be required. The opinion which has been avowed by the court is, that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him."

The courts in this age, as all the decided cases upon the subject show, have become much more liberal than formerly. In fact, if it was the rule that a man was to be excluded, except when he had heard nothing
335 about the case, or formed any opinion about it, it would be impossible scarcely ever to get an intelligent jury, because almost every one reads of these crimes, no matter where they occur. But where persons are able to answer, as this juror did, in his concluding answer, that nothing that he had heard or read would influence or bias his judgment, but he would be controlled by the law and the evidence in the case, and render a fair and impartial verdict upon that, I think they are qualified, and I think he was a qualified juror.

I think I have said all that is necessary upon the questions of the qualifications of these jurors, and I do not think the court committed any error in deciding that this particular gentleman was competent.

The next cause as set up in the motion for a new trial is:

"That the court erred in admitting in evidence the warrant of arrest purporting to be issued by Commissioner Wheeler for the arrest of Henry Starr, Edward Newcomb, Jesse Jackson, and Ben Benjamin, dated 13th of November, 1892."

There are no reasons offered why the court erred and I am unable to see why the court erred in admitting that evidence, and it was certainty competent as showing authority for this arrest. It was admitted for that purpose in connection with the other testimony which showed that Mr. Dickey was a deputy marshal and properly held this writ, and that Mr. Floyd Wilson, the deceased, was his possee and had a right to assist Mr. Dickey in arresting the parties charged and bringing them to this court that they might be tried.

The next cause for a new trial, as set out, is:

336 "Because the court erred in permitting the district attorney to ask the Government witness, Arthur Dodge, over the objection of the defendant, the following question: 'I will ask you if he did not state this, in order to refresh your memory; did he not state to you, "I hated like hell to have to ride your horse off, but could not do any better; I was afraid the whole damn country was alive with marshals; I took you and Miller to be United States marshals."' And in permitting the witness to answer the question as follows: 'Yes, sir.' And also the following questions by the district attorney and answer by witness:

"'Q. I will ask you if he did not say this in addition, "After this I don't want you to let any other damn marshal get on your horse so long as he lives; your horse is what fooled me; I thought it was some of your boys coming out there." I will ask you if he said this in addition: "That is what fooled me; I never knew any difference until he got pretty close to me."'

"'Answer. Yes, sir.'"

This was objected to on the ground that the question was leading and suggestive and therefore prohibited. Now, the object of the rule prohibiting the asking of leading questions is to take away from swift, or unduly willing, or corrupt witnesses the right to testify to things they know nothing about, because they are testifying to what the attorney says; the attorney does the testifying and the witness does the swearing. That is too much the case in this age of practice. It frequently happens that the attorney, in his ambition to win his case, without being under oath, proceeds to testify and the witness answers. But when there is an unwilling witness, or a forgetful witness, the attorneys on either side of the case have a perfect right to refresh his memory by suggestion. Now,

337 I take it from what transpired here, and from the facts in this case, that the evidence of this witness was properly taken down by the district attorney and his assistant when the witness was here before the grand jury; and such a course is a very wise precaution in these trials, either in examinations before the commissioner or before the grand jury, especially in murder cases, to have the statements of witnesses taken down before pressure in the shape of fear or inducements of other character are brought to bear upon them, as is often the case in that Indian country. The evidence of these witnesees was take' down, and it is very manifest from the character and conduct of these witnesses upon the part of the Government in this case that if that precaution had not been adopted by the district attorney there was scarcely one of the witnesses who would not have had such a failing recollection as to be unwilling to tell any of these facts, because it was manifest that, either through fear or favor for the defendant they came here unwilling to tell anything except when it was pulled out of them. That was manifest before this question was put to Mr. Arthur Dodge. The question now is, whether under the law the district attorney had the right to refresh the recollection of the witness. Mr. Greenleaf, in his work on Evidence (vol. 1, sec. 435), says:

"Exceptions: In some cases, however, leading questions are permitted, even in a direct examination, namely, where the witness appears to the party producing him, or in the interest of the other party, or unwilling to give evidence, or where an omission in his testimony is evidently caused

by want of recollection, which a suggestion may assist. Thus, where
338 the witness stated that he could not recollect the names of the component members of a firm, so as to repeat them without suggestion, but thought he might possibly recollect them if suggested to him, this was permitted to be done. So, where the transaction involves numerous items or dates. So, where, from the nature of the case, the mind of the witness can not be directed to the subject of inquiry without a particular specification of it, as, where he is called to contradict another," etc.

That is the law as declared by all the works upon evidence. And it seems to me that there could be no doubt in the mind of any one who saw the conduct of Mr. Arthur Dodge—not that he is not a truthful man—and this other witness, Mrs. Padget, and all of them, that it was a case where it was highly proper that the court should permit the district attorney to put questions which would refresh the memory of these witnesses. It was absolutely in the interest of truth that it should be done. I think Mr. Arthur Dodge was a truthful man, and the fact that that suggestion was made to him and he answered it in that way, does not make it any the less truthful. It is manifest that from some cause or another witnesses were not willing to readily disclose what they knew in this case. I do not believe there was any error in permitting the district attorney to put this leading question. These are matters, as the law declares, which are in the discretion largely of the court. Courts sit for the purpose of ascertaining the truth, getting at the truth, and to enable the jury to pass upon that truth, and seeing what sort of case is before them by the light of that truth. They do not sit for the purpose of using technical rules to cover up the truth, to keep it from the light of day, so it can not be used
339 in a proceeding of this character, but their office and their mission is to use all reasonable and proper means to get at the truth in order that the jury may have the benefit of it.

The next cause for a new trial, as set out in the motion, goes to the court's refusal to give certain instructions asked for by the defendant. I will not take up time to read these instructions. They are preserved as given in the charge of the court and as they were asked for by the defendant. Those asked for by the defendant were given with the exception of one, I think, which was refused. I want to say this, however, that in my judgment every one of these instructions asked for by the defendant, even as given by the court, were much more favorable to the defendant than he had a right to ask under the law. As asked they set up a hypothetical state of case, and show that in the light of the circumstances of that state of case that the defendant had a right to kill Floyd Wilson; but they all, I think, each and every one of them, entirely ignore the legal proposition that if that state of case was created by his own act, then the right to slay did not avail because of the facts and circumstances of his creation. This objection goes to all of them, and those which were given were given embracing the propositions as modified by the proviso that the defendant did not by his own wrongful act create the condition where it was necessary and proper and right, under the law, for Mr. Floyd Wilson, the deceased, to use violence to overcome danger that was menacing even to his life. There is not one of these instructions asked for that, standing alone and without modification, would be supported by a principle of

law found anywhere. They are merely hypothetical cases giving
340 to a man under any and all circumstances the right to slay an officer, provided that officer uses menacing danger to him, although the law permits the officer to do it when it commands him to make the arrest under certain circumstances which are clearly set out in the charge of the court. One of them is that if he is resisting arrest. And the court in this case went even further in favor of the defendant by guarding that declaration in regard to resistance when it said resistance of a dangerous and deadly character, and the law does not require that before it gives to the officer the right to overcome that resistance even by death. That is the truth about the matter. But the law of the charge embraces the proposition that this resistance offered by the defendant, which Mr. Wilson had the right to overcome by deadly violence, was of a dangerous and deadly character. That is the declaration of a principal of law that is more lenient towards him than the law really authorizes.

There is another state of case where Mr. Wilson had a right to use violence, and that was when he (the defendant) was escaping when he was charged with a high crime, with a felony. The law says that to prevent escape of that kind, in order that the power of the law shall be upheld, in order that the right of arrest shall be asserted, that he can stop that escape by taking the life of the man escaping, and it is not necessary that he should be actually in the act of running; if he is setting at defiance by words or acts the officer, if he is holding his gun in a menacing and threatening attitude as though he was then and there about in the act of using it that
he might have an opportunity to flee, and is backing off or putting
341 himself in a position to escape, the officer's right to act commences then and there. Each and every one of the instructions asked for by the defendant exclude these conditions; and therefore under the law the court modifies them, giving the most of them, except one, in a modified condition. And I do not believe there is any error in the refusal of the court to accept them. If the court had accepted them it would virtually have proclaimed the doctrine that every flying felon in this country had in his hands the power, and in his possession the right to slay any man who, under the direction of the law, was pursuing him to bring him to justice. And it matters not what view others may take of principles of law of this kind, this court is not here for the purpose of assisting in carrying on a travesty on justice of that kind. This court, I assert again, is here, and will remain here while it does for the purpose of upholding the laws of this country, and supporting its officers in all cases when they are in the right.

Now, the other objections commence at the tenth one. All other objections set up in this motion relate to the charge of the court. The charge has been delivered; the jury have received it, and have acted upon it; it will be spread of record where the Supreme Court can fully see it; and it is not necessary therefore for this court to speak in justification of it any further. This court feels that every proposition in it is abundantly sustained by the laws of this land, and it is sufficient to pass by these numerous objections because we do not think it necessary to say anything
further as to these objections commencing with the tenth, except to
342 say that the court conscientiously and honestly believes that which it declared was the law or it would not have given it.

Taking into account the causes for a new trial offered, and the grounds supporting them, the court will overrule the motion, and it is so ordered.

Mr. CRAVENS (of counsel for defendant). We desire to save an exception, and would like the court to give us time to prepare our bill of exceptions.

The COURT. I want to say this to gentlemen of the bar in regard to the practice of saving exceptions, that I do not know how many authorities there are in the shape of decided cases which make it unnecessary to take any exception to the action of the court in overruling the motion for a new trial in a case. The appellate court never notices it, it amounts to nothing, and has been so declared by the Supreme Court time and time again. It is not necessary to take exceptions to such a ruling; it goes as a matter of course. The fact that you file a motion for a new trial, and the fact the court overrules it puts you in the attitude of setting up whatever right you may have without excepting to the action of the court.

Mr. CRAVENS (of counsel for defendant). But we have to submit to the court and ask the court to sign a bill of exceptions, and we want time for that. That is what I am asking time for.

The COURT. What time do you want for that?

Mr. CRAVENS (of counsel for defendant). I suppose ten days would be sufficient.

The COURT. Well.

The court then pronounced the sentence of death upon the defendant, Henry Starr, when the following took place:

343 Mr. CRAVENS (of counsel for defendant). We wish to save an exception, and have the time fixed for filing our bill of exceptions.

The COURT. Have you not got them ready?

Mr. CRAVENS (of counsel for defendant). No, sir; not quite. We hope to have them ready before a great while, but I don't know exactly when we can. Of course, this is the last day of the term.

The COURT. I do not want to grant too much time. I want to get this case to the Supreme Court so it will be disposed of at this term.

Mr. CRAVENS (of counsel for defendant). The sooner it is disposed of the better we are satisfied.

The COURT. It is better for everybody to have these cases tried promptly and disposed of.

Mr. CRAVENS (of counsel for defendant). We are right here in the midst of the court, and we only want such time as will enable us to prepare and file our bill of exceptions. We are working on it now.

The COURT. I will give you until this day week. This is Saturday.

Mr. CRAVENS (of counsel for defendant). We would like to have until Monday week.

The COURT. Well, Monday week. I will hold you strictly to that time. The clerk will make an order showing that the counsel for defendant have until the 13th of November, 1893, to tender their bill of exceptions.

344 To which action of the court in overruling said defendant's motion for a new trial the defendant at the time excepted, and now tenders this his bill of exceptions, and prays that the same be signed and made a part of the record in this case, which is accordingly done.

I. C. PARKER,
U. S. District Judge, holding Circuit Court.

345 *Assignment of errors.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF,
vs.
HENRY STARR, DEFENDANT. } Murder.

Now, on this day, comes the defendant, Henry Starr, by W. H. H. Clayton, Wm. M. Cravens, and Thos. H. Barnes, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. Because the court erred in excusing from service on the jury for cause, over the objection of the defendant, James Bill, Simon Severe, and Thos. W. Hamlin, who were qualified jurors to serve in the cause.

2. Because the court erred in refusing to sustain the defendant's objections to Edward Taylor serving on the panel, and declared by the court to be a competent juror.

3. Because the court erred in admitting in evidence the warrant of arrest purporting to be issued by Commissioner Wheeler for the arrest of Henry Starr, Edward Newcomb, Jesse Jackson, and Ben Benjamin, dated 13th of November, 1892.

4. Because the court erred in permitting the district attorney to ask the Government witness, Arthur Dodge, over the objection of the defendant, the following questions: "I will ask you if he did not state this, in order to refresh your memory, did he not state to you, 'I hated like hell to have
346 to ride your horse off, but could not do any better; I was afraid the whole damned country was alive with marshals. I took you and Miller to be United States marshals?'" And in permitting the witness to answer the question as follows: "Yes, sir." And also the following questions by the district attorney and answer by witness:

"Q. I will ask you if he did not say this in addition, 'After this I don't want you to let any other damn marshal get on your horse as long as he lives; your horse is what fooled me; I thought it was some of your boys coming out there.' I will ask if he said this in addition; 'That is what fooled me; I never knew any difference until he got pretty close to me?'"

"Answer. Yes, sir."

5. Because the court erred to the prejudice of the defendant in refusing to give instructions number one (1) asked for by defendant.

6. Because the court erred in refusing to give instructions 2, 3, and 4, asked for by defendant.

7. Because the court erred in adding to and modifying instructions 2, 3, and 4, asked for by defendant.

8. Because the court erred in its instructions to the jury in this:

First. Because the court erred in declaring to the jury that "the defendant asserts that he is guilty of nothing; that the law protects him; that he stood within the law and within its protecting power when he took the life of Floyd Wilson. If that be true, according to the terms of the law, then he is entitled to this protecting power. If it be not true he

stands without the pale of the protection of the law, which may be thrown around a man under certain circumstances, and give him the right, even as a private citizen to take human life." (P. 2.)

347 Second. Because the court erred in saying to the jury: "You are to see to it whether this vital, living sign of this great protecting Ægis called the law of this goodly land, in the shape of its officer, under the circumstances and facts in this case, was entitled to the protecting power of the law of self-defense. Because, if he was in the right in the execution of his duty, if he was performing that which I did not command him as a judge of this court to perform, but which the chief executive officer of this nation, whose headquarters are at the capitol of this country, commanded him as one of his subordinates to do—if he was right in the method he adopted in doing it, then he is surrounded by the whole power of the law of self-defense." (Pp. 2, 3.)

Third. Because the court erred in saying to the jury: "The very nature of the defense of this defendant impliedly admits that Floyd Wilson is dead; that he died by violence of the character named in the indictment, and that the defendant inflicted that violence upon him." (P. 5.)

Fourth. Because the court erred in saying to the jury: "There are certain other elements which enter into that act which must be taken into consideration by you to enable you to characterize the killing to say whether, under the law I am about to give you defining this crime or the elements entering into it, it possesses these attributes which make it the crime of murder—the highest crime practically known to the law of this country; the crime that is practically of the most serious import known to the laws of this country; the crime which takes away the support of a family; which robs the innocent individual citizen of that which he has no right to be robbed, and that which he does not forfeit under the

348 law, except by his own conduct, and when the law says he shall forfeit it." (P. 6.)

Fifth. Because the court erred in saying to the jury: "Now, that is what is meant, in short, by a man's killing another intentionally. He presents the gun at him, and he fires it at him within shooting distance; the man is killed. You have the facts which ordinarily and usually convince a reasonable man that he intended to kill—that he intended to take life. He is not permitted by the law to forget that proposition, because there is flowing, in the estimation of the law, naturally, reasonably, and probably from his act a deadly result—a deadly consequence, that the law holds him to have intended." (P. 10.)

Sixth. Because the court erred in saying to the jury: "It goes to characterize the condition of the mind, and it goes to enable intelligent minds to know what the party contemplated—what he intended when he was doing the act, and that contemplation can be found only from circumstances—that is, by the nature of the act done, and the way it was done, and the character of the weapon used, as I have told you, bearing in mind that the law holds every man to know the nature of the weapon that he uses, the purpose for which it is constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion. For that reason when a man presents

a gun or a pistol at another and shoots it at him the law says that he intends to kill, because the killing is a result that is natural, or probable, or reasonable." (P. 11.)

Seventh. Because the court erred in telling the jury that in determining whether defendant shot the deceased wilfully or not they
349 should look at the result produced by the shooting, look at the character and number of the wounds upon the person of the man killed.

Eighth. Because the court erred in instructing the jury as to the meaning of the term "willful."

Ninth. Because the court erred in saying to the jury that "If you are satisfied that this killing was done wilfully—and I want you to note the terms I am about to use—done wilfully, and done in such a way as not to be justifiable under the law of self-defense, and done in such a way as that there are no mitigating facts in it to reduce the grade of the crime—if the evidence shows that it was done wilfully, and done without justifiable cause or in the absence of mitigating facts, the law says it was done with malice aforethought; and the establishment of the proposition that it was done wilfully and the banishment from the case the other proposition that it was not done under the law of self-defense, or that it was not mitigated under the law so as to reduce the grade of it, leaves the killing in the condition where malice aforethought springs into existence from the party having done the wilful act. There are but three conditions growing out of homicide under American law—I do not mean the law of the States, I mean the law of the United States; one is a condition where murder exists and the other is a condition where the act is no crime at all, because excusable under the law of self-defense, and the other is a condition where the crime is of a less grade and where the killing is not characterized by wickedness, brutality, or savagery, and is called manslaughter. If the condition which is known as the condition of self-defense does not
350 exist in the case, and if the condition which is known as the condition of manslaughter does not exist in the case the only sensible conclusion we can arrive at by eliminating these two propositions from the legal equation is to find that there is the only remaining proposition in it, and that is the proposition known as murder" (12, 13).

Tenth. Because the court erred in instructing the jury as to the law of malice aforethought.

Eleventh. The court erred in saying to the jury: "But when a man contemplates taking another's life without its being necessary to defend himself, he can not set up anything, even in mitigation of the act, of that kind; because this element of murder, known as malice aforethought exists, which grows out of a state of premeditation, a state of case where he thinks of it beforehand and kills in such a way as that the act of the killing cannot be mitigated or justified; the fact that he thought of it beforehand shows that it was done deliberately—that it was done with premeditation, and it consequently grew out of a wicked condition of mind, a mind that entertained a purpose to produce a deadly result without just cause or excuse, or in the absence of mitigating circumstances."

Twelfth. Because the court erred in saying to the jury: "When a man forms a deliberate intent to kill another, that is a malicious killing" (20).

Thirteenth. Because the court erred in saying to the jury: "I state this to show you how rapid the human mind can act; and in this age, an age when we have weapons of destruction brought to such perfection that in the twinkling of an eye a heart's blood is let out, that in the twinkling of an eye a thought to destroy human life is conceived and execu ed;
351 I say in this age when we have such elements of destruction and when so many men have forfeited their innocent lives because of the reckless and wicked use of these elements of death and destruction to life, because of the ease with which they can be used, and the rapidity with which the deadly, hissing, burning missile can reach the vitals of its victim; it is important for us to note this fact, that the human mind is capable of such rapidity of thought that it may conceive a deadly purpose and then and there contemporaneously, apparently, and practically with the conception of it, may execute it, and yet when that it done, the conception of the purpose was without justifiable cause, or in the absence of mitigating facts; it is premeditated in the law; it is thought of beforehand."

Fourteenth. Because the court erred in saying to the jury that "though the law requires premeditation, the thought to kill must be contemplated beforehand, yet the contemplation of it may be cotemporaneous with the execution of that thought" (22).

Fifteenth. Because the court erred in saying to the jury that "Malice is an intent of the mind and heart, the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, and in the absence of mitigating circumstances which produces death, it is murder, whether it grows out of special spite or animosity or a specific design to take life, or the purpose to do some other act of a wicked, malicious, and criminal nature, which, because of its nature and the way it is done a human life is taken, malice aforethought exists, because that is the doing of a wrongful act without just cause
352 or excuse which results in murder. It evinces a formed design to do such mischief as may deprive a fellow being of life" (p. 23).

Sixteenth. Because the court erred in saying to the jury: "For example—having reference to the latter part of the sentence I have just given you, if this defendant formed a design to resist the execution of legal process upon him he had in contemplation a purpose to resist it by armed violence, if occasion offered and occasion did present itself and in the execution of this purpose, of this previously formed design to resist the execution in a proper way of this process of this warrant and took the life of Floyd Wilson, then he is in the attitude of doing a wrongful and unlawful act, and by executing it he takes a human life, and when he does that wrongful act in that way, in that illegal and improper way, as you may see it after you have heard the law defining the rights and duties of officers and citizens, and he contemplated a purpose to do that, and he was going about the country armed for the purpose of resisting arrest that was to be properly executed upon him, and then he takes a life in pursuance of a previously formed design to do an act which may produce a deadly result, the law says that there is a crime. It says that if men form an intention of doing such a thing and they seek to do it, and in execution of it they take a human life, they may have had no specified design to kill, but if

they had a design to do these other things that I will name presently, and in the doing of those unlawful things they take a human life, the law says it is murder" (pp. 23–24).

Seventeenth. Because the court erred in instructing the jury that
353 "If a man enters upon the purpose of resisting the execution of legal process, sought to be executed in a legal way, he enters upon the doing of which may produce death, which may cause the destruction of human life, because as I will show you further on, at that stage of the proceedings of that character the officer has belonging to him certain great rights—yea, I will classify them more correctly. There is devolving upon him embodied in this great command that I will read to you presently, great duties, and a human life may be destroyed by his failure to observe them, and when a purpose is formulated to resist arrest that may be sought to be executed in a legal way and the party prepares himself for that by arming himself with a Winchester and a pistol, marching about the country preparing for the onset, if the occasion offers, and because of that he take the life of the officer, he is then committing an act which results in death growing out of premeditated purpose to do an act which indirectly endangers life, and because of tha' *eat* he would be guilty of murder, though he might not have any specific intent against the officer other than to resist by violence the legal execution of legal process by him. It is therefore necessary that you should note this passage which I have given you" (pp. 25, 26).

Eighteenth. Because the court erred in saying to the jury: "Anything that shows deliberation, anything that shows premeditation, a premeditated purpose to do a wicked or wilful act that might result in death, is a fact that may be considered by the jury going to show the existence of malice aforethought" (pp. 27, 28).

Nineteenth. Because the court erred in saying to the jury: "Therefore,
354 there is an absence from the case of that date of facts which goes to show that the party had a right to do what he did do. The law lays it down that the deliberate selection and wrongful and unlawful use of a deadly weapon shows premeditation, shows that the act was thought of beforehand, and whenever a party entering upon what unlawful or criminal enterprise he may enter upon, prepares himself with a deadly weapon for the purpose of using it in a wicked or unlawful way, the fact of so preparing the weapon and in selecting it for use in that unlawful and wicked way, in a way not authorized by law, in a way that the law could not mitigate the act, if done—I say the fact of the selection and preparation of a deadly weapon, and the use of it in an unlawful and deadly way, after he has so selected and prepared it shows the existence of a state of premeditation, shows that he thought of the purpose to kill wrongfully and unlawfully before he executed it, and when that state of case exists there is a condition of malice aforethought which goes to characterize the act as done" (p. 28).

Twentieth. Because the court erred in saying to the jury: "Look at the manner of the shooting, the time of the shooting, the very nature of the wounds, and their very number, and under what circumstances they were inflicted" (p. 30).

Twenty-first. Because the court erred in instructing the jury as to the law of self-defense.

Twenty-second. Because the court erred in saying to the jury: "The fact that we love to sleep in quietude, and in protection, beneath our roof-tree, in the presence of our own family altar, in the night time, commands us to uphold this mighty power which walks in grandeur and majesty throughout this land and surrounds every house, and says to every assassin, to every burglar, to every murderer, 'Thus far and no farther.' It is a great and mighty power, and for the maintenance of which governments are instituted. This mighty power that so protects all the innocent is but the will of this great people, their expression in legal form, prescribing a rule of acting binding upon all, commanding the respect of all, and beneath it all must bow, and in this government of the people and by the people the law is the mandate to which we bow; the law is the supreme ruler. You then in this case must solemnly, deliberately, and dispassionately and reasonably look at these facts to see whether the power, and majesty, and dignity, of the mighty protecting agency has been trampled upon ruthlessly and wickedly and with malice aforethought by this defendant, by means of which act a man has been robbed of his life, if that be the true condition" (p. 31).

Twenty-third. Because the court erred in saying to the jury: "If we have created a condition that leads to a deadly result, the law of self-defense does not apply to it; if we create that condition by doing a wrongful thing upon our part which would naturally or reasonably or probably produce a deadly result, the law says there is no self-defense for us, because we are in the wrong in the first place; and especially does that principle apply to a case when we are doing an act which from its nature and the way we are doing it death would be naturally produced in the conflict that may ensue because of the act that we do. I say, then, we must enter upon the execution of this grave act upon our part with clean hands and a pure heart, or, as the law expresses it, we must be in the lawful pursuit of our business" (p. 33).

Twenty-fourth. Because the court erred in saying to the jury: "Now, let us see again, by enumerating each condition that must enter into what they are. First, we must be in the right; we must be doing what we had a right to do at the time of the killing, and when we are so situated we are attacked by another. How? What sort of an attack? Why, under circumstances which denote, from the character of the act and the way it is done, an intention to take away our life, or do us some enormous bodily harm, under such circumstances, provided still we did not bring on the conflict by a wrong upon our part which would necessarily and naturally precipitate it, under such circumstances we may lawfully kill the assailant, provided we use all the means in our power otherwise to save our own lives, such as retreating. That is what the law says. We frequently hear it in argument, that that is not manly. It is not manly to save human life when we can do it. It is not manly to obey the golden rule. It is not manly to obey the laws of our country, when they say in thunder tones everywhere that before taking human life, though the man whose life is taken may be in fault, we must do everything that *he* reasonably can to prevent that last resort, that last thing we can flee to. We must avoid the necessity for it if we can" (p. 34).

Twenty-fifth. Because the court erred in saying to the jury: "Now, in this case, this contemplates as far as this case is concerned, that at the

time that Floyd Wilson was killed that this defendant was in the right; that he was doing exactly what he had a right to do, and when so situated he was attacked by Wilson in such a way as to indicate a deadly purpose upon his part. About that there can be no question—that is to say, if Wilson shot at him, shooting at a man is evidence of a deadly pur-
357 pose, and when that transpired if he could not by exercise of any other reasonable means, or the doing of any other reasonable act, such as surrendering to the officer, such as by his action taking away the necessity of exercising of any more force, that he could not do that and stop the difficulty, or that he could not do that by avoiding the condition that existed, or that he could not do it by exercising less violence than he did exercise he could kill Wilson; but there must be an absence from the case of these propositions before this principle of the law of self-defense can be applied at all to the case. He must be in the right; he must be doing what he had a right to do. We will see after awhile whether under the law his position was of a character that he was in the right, that he was doing what he had a right to do, and that Wilson wickedly, unjustifiably, without reasonable cause, attacked him in such a way as to jeopardize his life, and that he could not escape from that danger except by taking his life" (pp. 34, 35).

Twenty-sixth. Because the court erred in instructing the jury: "He may lose that right by his own bad conduct, because the law says he must be in the lawful pursuit of his business; he must be in the right; if he creates a condition by his own wrongful act, if he brings into condition such a condition upon what principle of right could he invoke the law of self-defense, when he has created the very condition that he now invokes. For instance, among other things, in this: If a man goes to the place where the slain person is, or if he is at the place, with a deadly weapon, for the purpose of provoking a difficulty, or with the intent of having an affray he can not invoke the law of self-defense, because he has no right to do that. If he is at that place, and while there he is prompted
358 by a design to do that which the law forbids his doing—obstructing, or hindering, or intimidating the execution of lawful process by the exercise of force or violence of a dangerous character to the life of the officer—that is a crime under the laws of the United States. If he is there armed and equipped for that purpose, and he is in that position prompted by a design of that kind, and that is made manifest to the officer, then the officer has a right to invoke this right of self-defense from the time that condition springs into existence. This law of self-defense did not belong to the defendant alone, but it belonged to Floyd Wilson as well as the defendant, and it was thrown around him as an officer to the highest degree, providing he is in the proper exercise of his duty. It surrounds him at the time and at the place where he enters upon the performance of his duty; from that time he is panoplied with the whole power of the law of self-protection, of self-defense.

How unjust, how cruel, what a mockery, what a sham, what a bloody crime it would be upon the part of this Government to send a man out into that Golgotha to officers, and command them in the solemn name of the President of the United States to execute these processes; and say to them, men may defy you; men may arm themselves and hold you at bay; they may obstruct your process; they may intimidate your execu-

tion of it; they may hinder you in the arrest; they may delay you in doing so by threats of armed violence upon you, and yet I am unable as Chief Executive of this Government to assure you that you have any protection whatever. It is for you, gentlemen of the jury, to say whether the rule invoked by argument in the defense as to the character of these laws, and as to the rights and duties of these officers,
359 is the law of this case, or whether it is to be found as declared by the solemn declaration of this great compact in the shape of the laws which binds the people of this country together, and which makes them a harmonious, united, and common people—harmonious and united in their desire to uphold and enforce the law against all violaters and all offenders of it. When I say to you in this case that if this defendant was at that place, or he was going about the country there, and happened to be overtaken by these officers armed, and went armed there for the purpose of resisting the process of the law that was sought to be properly executed against him, if that was what prompted him to carry these arms, if that was his object, if that was why this conflict sprung into existence, then he engages in a conflict which precipitates by a violation of the law upon his part, by a design to trample upon the law, by a design to set it at defiance, by a design to bid defiance to all the law and all its rights and all its power, when he does that, and if while doing it he undertakes to execute a wicked and unlawful purpose of that kind, and a conflict ensues in which he takes a human life, he is guilty of murder; provided that officer was in the lawful exercise of his duty. He is guilty of murder, and nothing else" (pp. 38, 39, 40).

Twenty-seventh. Because the court erred in instructing the jury as to the law of manslaughter, and in saying to the jury: "Now, it may be proper in this connection, before going further, that I say to you there is a crime under the law—and it is embraced in this indictment—which is called the crime of manslaughter, which is of less grade, of less
360 magnitude, of less wickedness than the crime of murder, because there is out of it this terrible black thing called malice aforethought, this wicked thing which corrodes the heart and corrupts, yet controls, the mind There is out of that crime, there is not in it all, that element, because the law of the United States says that whoever kills another wilfully and unlawfully without malice aforethought is guilty of the crime of manslaughter. I give this to you; it has not been asked by the defendant. They say their client is guilty of nothing at all; they asked you in the argument, I believe—one of the gentlemen—when you acquitted him to give him some mead of praise for his act. Well, the law does not require you to do that, and you had better stop with exercising your legal duties; perform your legal duty and go no further. There may be a state of case to which you can apply the crime of manslaughter. That is for you to say, not me" (pp. 40, 41).

Twenty-eighth. Because the court erred in saying to the jury: "Do you have to wait until the gun is presented at you? What security to life against these deadly weapons would men have if this was so? Do you have to wait until the gun is fired? A violent demonstration which amounts to an assault with intent to kill, with a Winchester or pistol, may be made far short of that. If a man is making a demonstration with his gun, and has gone far enough to show a purpose from the way he is han-

dling it, from what he may have said, from his actions, a purpose to use it upon his adversary, then the man upon whom he is endeavoring to use may stand upon the defensive; and especially is that true with reference to an officer in the exercise of his duty that he is commanded to perform.

So, in this case, if this defendant was making a demonstration with
361 his Winchester or pistol, that from its character, or from what he said, if it be true, if you find from the evidence that he was defying the officer after he demanded his surrender, or told him he had a warrant for him, if he was defying him by making a violent demonstration with the weapon, going sufficiently far with it to indicate to a reasonable man that his purpose was then and there to put it in a position to use it, the man who stood opposite him as an officer from that time stood upon the defensive—he stood upon the defensive all the time before that in going to that place, and it remained with him as long as he was in the right" (pp. 41, 42).

Twenty-ninth. Because the court erred in saying to the jury: "To assist in executing process by arresting prisoners he has full power, full authority, especially in a case like this, when he was as one in the immediate presence of his chief, as the evidence shows he was of Dickey; they were both there together" (p. 45).

Thirtieth. Because the court erred in saying to the jury: "Wilson and the officer then had legal authority to enter upon the mission they did enter upon, and what was that? What was the posse to do? To go into the Indian country and hunt up Mr. Starr and say to him that on a certain day the judge of the Federal court at Fort Smith will want your attendance at a little trial down there wherein you are charged with horse stealing, and you will be kind enough, sir, to put in your attendance upon that day, and the judge sends his compliments to you, Mr. Starr. Is that his mission? Is that the message from this court to be handed to Mr. Starr upon a silver platter with all the formalities of polite society? Is that what Floyd Wilson was employed or engaged to do?"

362 Thirty-first. Because the court erred in saying to the jury: "They were, then, lawfully commissioned, and they had a right to execute that paper, and they had a right in a legal and proper way to overcome all opposition to the execution of it; and you will bear in mind that under the laws of the United States it is a crime for a person to interfere with the execution of papers of that character, for the law says in section 5398, Rev. Stat., that—

"'Every person who knowingly and wilfully obstructs, resists, or opposes any officer of the United States in serving, or attempting to serve or execute, any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ of process, or assaults, beats, or wounds any officer or other person duly authorized in serving or executing any writ, rule, order, process, or warrant shall be punished,' etc."

(Pp. 46-47).

Thirty-second. Because the court erred in instructing the jury as follows: "Now, it is not necessary that he should make proclamation that he is Smith, or Jones, or Floyd Wilson; he must say that he is an officer, or that he has a writ, or something to indicate that he is an officer. If he says, 'Hold up; I have a writ for you, or a warrant for you,' that

implies that he is an officer, that he has official authority, because, if he is a citizen, though armed with a writ he can not execute it under the law; he could not be anything but an officer with a paper of that kind in his possession. And if his chief had a paper, if Mr. Dickey had a paper in his possession, and, at the distance where this killing occurred from where Dickey, was Wilson made the proclamation that 'I have a warrant
363 for you,' or, 'a writ for you,' he was not required to go any further than that at that time" (p. 48).

Thirty-third. Because the court erred in saying to the jury: "When a man stands with his gun in his hand, and his pistol in his belt, and the officer commands him to surrender, or to hold up, and he says to the officer, 'You hold up,' with his gun in a threatening position, if that *h*be the attitude of it, the officer is not required to show his authority; he has no time to do it, because the law says to him that from the time he enters upon this mission he has the law of self-defense in his favor and his behalf, and that he has a right to invoke it as long as he is in the right; it says to him: 'You have a right to stand upon it to watch for your safety and your security, because, although this Government sends you upon a dangerous mission, it undertakes to protect you as long as you are in the proper exercise of your rights or execution of your duties'" (pp. 50, 51).

Thirty-fourth. Because the court erred in saying to the jury: "If the defendant did that which obstructed it, which impeded it, which hindered it, which delayed it, he was in the wrong and the officer was in the right, and if the act of obstruction was being wilfully done, and intentionally done, that act of hindrance, or the act of delay was by a threatening position of a dangerous weapon, then the officer had a right to so far stand upon the defensive as to do that which was necessary to overcome that obstruction, because he is commanded to execute this paper, and if the party offers resistance, and if that resistance is of a dangerous and deadly character, the officer can overcome it by an act of deadly violence if
364 the party is seeking to obstruct, or to hinder, or delay the execution of the process by resistance of a deadly character, and in this way is enabling himself to avoid capture, to get away, to escape, he is doing that which gave Floyd Wilson in this case the right to overcome that obstruction and that resistance that was offered to him in the execution of this process" (pp. 51, 52).

Thirty-fifth. Because the court erred in saying to the jury: "I say when he can with regard to his own safety make his mission known, it is his duty to do so, to demand admittance into the house, and if it is not promptly opened, or opened in such a time as he thinks it ought to be, taking into consideration the fact that the party may have a chance to escape by delay, he can break in the door, because it is no longer a sacred castle. It is a place, if he has reasonable ground to believe that the man he is seeking for has taken refuge there from justice; that he has a right to go and arrest him; or, as I repeat again, the power of arrest is a power in the hands of the people so much greater for their safety than the right of any citizen individually that this power can be exeecuted even there" (pp. 53–54).

Thirty-sixth. Because the court erred in instructing the jury as follows: "The officer armed with a lawful warrant, or in making a lawful arrest without a warrant, has a right to, and it is his duty to use every means

necessary to make the arrest, when the party is charged with a felony; if it is resisted he may use force, and such force as is necessary to overcome the resistance, even to the taking of life. In such a case, if the person resisting is killed by the officer, it is justifiable homicide" (p. 54).

365 Thirty-seventh. Because the court erred in saying to the jury: "Is it necessary for the officer to wait until the man he is seeking to arrest points his gun or pistol at him, or shoots at him? If he bids defiance to the officer, if he is handling his gun in a threatening way as if he intended then and there to use it, putting it in a threatening attitude, he would be guilty of an assault with intent to kill at that stage, and the officer would have a right to overcome that force by an act of violence that would destroy his life, if he could not overcome it by any reasonable means. If that was the condition as existing between Floyd Wilson and this defendant, if he stood the authority of Wilson at defiance, after knowing that he was an officer by proclamation, or from good reasons and grounds he could have known it—and it was necessary that he should know it was Floyd Wilson—if he knew he was an officer from the actions and declarations of that officer or from other facts and circumstances such as that he was looking out for officers, such as that the actions of the man were in harmony with the actions of an officer who was seeking to arrest him, he would have this fact brought to his mind by reason of these facts and circumstances, and it is your duty to find out whether he knew or had good ground to know as to what the purpose of Floyd Wilson was at that time, and just what attitude he put himself in, what was his condition at that time. If he was seeking to escape, knowing the officer's mission, or having good ground to know it, he was seeking to avoid that arrest, to stand the officer off until he could get away, then the law says that in the execution of this process if the officer could not capture him in any other way he had a right to take his life" (pp. 55, 56).

366 Thirty-eighth. Because the court erred in saying to the jury: "In case of resistance the thing exists then and there, and it threatens the execution of the process, and it threatens the life of the officer and is of a deadly character, and it is of that nature that the officer has a right then and there to act. The officer has a right to then and there act, if that be the condition, to the extent, if necessary—provided he cannot execute the process or turn aside the danger to himself in any other reasonable way—he has a right to act even to the extent of taking the life of the party who is resisting" (p. 57).

Thirty-ninth. Because the court erred in saying to the jury: "He was a fugitive from justice if he had jumped the bond he had in this court; as they say, if he had forfeited his bond, and was up in that country hiding out away from his usual place of abode to avoid arrest, he was then a fugitive from justice, and you have a right to take that condition into consideration" (p. 61.)

Fortieth. Because the court erred in saying to the jury: "You have a right to stand upon the defensive as long as you are in the right, and when your process is sought to be obstructed or impeded or you are hindered in the execution of it by violence of a deadly character, you can overcome it by death to the party who then obstructs or impeded the arrest if you can not destroy it in any other way, providing the crime he is seeking arrest for is felony" (p. 63).

Forty-first. Because the court erred in saying to the jury: "If the man you are seeking to arrest sets your authority at defiance, heaps indignity upon you by holding you at defiance, when you are armed by
367 the power of the law, you may overcome that condition by the use of such force as is necessary, even to the extent of taking life, if that act of threatened violence be of a dangerous or deadly character" (p. 63).

Forty-second. Because the court erred in saying to the jury: "You are to see what did occur, what was the final result; see what all the facts and circumstances surrounding the case were, and if you are satisfied beyond a reasonable doubt that the condition is established that, under the definition I have given you, is murder, your duty is to say so, because if that does exist it is not only the life of Floyd Wilson that has been taken, but it is the power of the law that has been set at defiance, and although the taking of the life of Floyd Wilson in a murderous and wicked way is a great and high crime, the crime of setting at defiance the law of this country, which protects every good citizen, and it is even a higher crime than the loss of that citizen's life" (pp. 63, 64).

Forty-third. Because the court erred in saying to the jury: "The fact that a man is in the employ of an express company is no reason why you should disbelieve him, and his testimony is not to be set aside by abuse hurled at him, or by jests, or sneers at his expense. It is to be regarded in the law solemnly and dispassionately, weighed justly and impartially. If it is not true when you look at it in the light of its reasonableness and consistency and probability, you discard it; but, if it is true, this man instead of being derided, instead of being abused, the officer who attempted this process is to be commended for it, because it is upon the execution of the law that we all depend for safety" (p. 64).

Forty-fourth. Because the court erred in saying to the jury:
368 "Now, again, this woman's (Mrs. Padgett) evidence is not to be set aside because she has been denounced as a Judas Iscariot. That does not impair the truthfulness of any witness's testimony. It is not crime to give information of a man who may be charged with a crime. The law of the United States says that if any citizen knows of the commission of crime and conceals it he is guilty of a crime that may send them to the penitentiary for three years. If these men were seeking to get information of the whereabouts of that man and this woman gave it, instead of being abused she is to be commended, because it is the duty of every citizen to do it, and it is neither good morals or good law to denounce her for it" (pp. 64, 65).

Forty-fifth. Because the court erred in instructing the jury as follows: "I say to you in conclusion, as the law says to you, because I am only its mouthpiece—I do not make any law; it is all given to me here to declare to you, and you take it as I declare it; you find the truth and make your application of that principle to the truth—after you have heard the law as I have given it to you, and the evidence as coming from the witnesses, if you are satisfied, as twelve intelligent, dispassionate citizens, sitting here ministering at the altar of justice, in its temple, you are able to say beyond a reasonable doubt that this defendant is guilty of having committed the crime of murder, your duty as men and as citizens and jurors, is to say so,

because when you are doing that you are but upholding the dignity, the power, and supremacy of this protecting ægis, which is our only safeguard, our only protection, and that by which the rights of the citizens are protected by its enforcement, by judicious, proper, faithful, and brave officers. Without these officers what is the use of this court? It takes men who are brave to uphold the law here. I say, because of this, and
369 because there is not protection unless the law is upheld by men of this kind, if it be true that you are satisfied of the fact beyond a reasonable doubt that Floyd Wilson was a man of this kind, that he was properly in the execution of the high duty devolving upon him, and while properly executing it by the light of these principles of the law I have given you his life was taken by this defendant, your solemn duty would be to say that he is guilty of the crime of murder, because if the law has been violated it is to be vindicated; you are to stand by the nation; you are to say to all the people that no man can trample upon the law wickedly, violently, and ruthlessly; that it must be upheld if it has been violated" (pp 69, 70).

Forty-sixth. Because the court erred in instructing the jury as follows: "I entrust the case to your hands with the abiding conviction that you will stand by the law; you will see to its vindication; you will maintain its supremacy; you will uphold its dignity; you will do that which, as good men, as good citizens, duty calls upon you to do; and when you do that, and your minds are directed by the light of this law and this evidence, and when you have come to an honest and conscientious conviction beyond a reasonable doubt, acted upon it and promulgated it, you will have done your whole duty" (p. 71).

Filed Nov. 18, 1893.

S. WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

370 In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF,
vs.
HENRY STARR, DEFENDANT. } Murder.

I, Henry Starr, the defendant in the above-entitled cause, do solemnly swear that I am not possessed of sufficient means and am unable to procure the same so as to prosecute the appeal taken in said cause in the Supreme Court of the United States.

I therefore pray that it may be prosecuted in forma pauperis.

HENRY STARR.

Sworn to and subscribed before me this the 18th day of November, 1893.

STEPHEN WHEELER, *Clerk.*
By J. M. BAXTER, *D. C.*

371 *Petition for writ of error.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, PLAINTIFF,
vs.
HENRY STARR, DEFENDANT. } Murder.

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner, Henry Starr, respectfully represents that at the August term, 1893, of this court he was convicted of the crime of murder, and this court has pronounced judgment and sentence of death upon him on the verdict convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings of the trial in said cause there is great and manifest error to the prejudice and great damage of your petitioner.

He therefors prays that a writ of error from the Supreme Court of the United States may be issued by you under the seal of said court removing said cause and record therein to the Supreme Court of the United States in order that the same may be there examined, and if error be found that the judgment and sentence against him may be reversed.

HENRY STARR.
By W. H. H. CLAYTON,
THOS. H. BARNES, and
W. M. CRAVENS,
His Attorneys.

372 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the U. S. for the western district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States of America and Henry Starr a manifest error hath happened, to the great damage of the said Henry Starr, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 6th day of Dec., in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.] STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western District of Ark.

Allowed by—

Justice of the Supreme Court of the United States.

373 UNITED STATES OF AMERICA, *ss:*

To Jas. F. Read, United States district attorney for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western dist. of Arkansas, wherein Henry Starr is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable I. C. Parker, judge of the district court of the United States, this 6th day of December, in the year of our Lord one thousand eight hundred and ninety-three.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

374 On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I, Jas. F. Read, U. S. district attorney for the western district of Arkansas, hereby acknowledge service of the within citation at Ft. Smith, in said western district of Arkansas, this 6th day of Dec., A. D. 1893.

JAS. F. READ,
U. S. Dist. Att'y for the Western Dist. of Ark.

375 UNITED STATES OF AMERICA, *Western District of Arkansas:*

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record in the case of U. S. vs. Henry Starr, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court at Fort Smith, in said district, this 6th day of Dec., A. D. 1893.

[SEAL.] S. WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Indorsed on cover:) Term No., 1080. Case No., 15464. Henry Starr, plaintiff in error, *vs.* The United States. W. Arkansas C. C. U. S. Filed December 12, 1893. Supreme Court U. S. Clerk's office. Received Dec. 11, 1893.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1080.

HENRY STARR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

STIPULATION AND ADDITION TO RECORD.

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1 In the circuit court of the United States within and for the western district of Arkansas.

UNITED STATES
vs.
HENRY STARR. } Murder.

Indictment No. 74.

I, Stephen Wheeler, clerk of the above-named court, do hereby certify that the original bill of exceptions now on file in my office touching interrogatories propounded to and answers made by Edward Taylor as to his qualifications as a juror to sit in the above-entitled case is as follows, to wit:

"Ed. Taylor, having been duly sworn to answer all questions touching his qualifications as a juror, was examined as follows, to wit:

The DISTRICT ATTORNEY. Have you formed or expressed any opinion in this case?

A. I have, sir,

Q. From what did you form that?

A. From hearing of the case and reading it afterwards when it was first committed.

Q. Do you mean this case for the killing of Floyd Wilson?

A. Yes, sir.

Q. Would it require evidence to remove the impression you now have as to the guilt or innocence of the defendant?

A. Well, I have not really any prejudice about the case whatever. Of course, hearing of the case it made me form some opinion as to what the case was.

Q. Well, notwithstanding that opinion, could you go into the jury box and give the defendant a fair trial?

A. Yes, sir; I could.

2 The COURT. You do not think what you have heard would influence or bias your judgment after you had heard the law and the evidence in the case, but you would be governed by the law and the testimony?

A. Yes, sir; I would be governed by the law and the testimony.

Q. And that would not bias your judgment or influence it at all?

A. It would not.

The DISTRICT ATTORNEY. Have you any such conscientious scruples against capital punishment as would prevent your returning a verdict of guilty in a case where the law and the evidence warranted it, such verdict to be followed by capital punishment?

A. No, sir.

Examination by defense.

Mr. CLAYTON (of counsel for defendant). Q. You say you read about this matter?

A. Yes, sir; some.

Q. And that you formed an opinion?

A. Yes, sir; I did at the time.

Q. Now, you remember what you read, I suppose?

A. I do not know as I could repeat it all over.

Q. If the evidence in the case should turn out to be the same as you read it, then you have a preconceived opinion with regard to the matter, havn't you?

A. Yes, sir; if it would turn out to be the same as I looked at it at that time.

Q. You remember now you formed an opinion, do you?

A. Yes, sir.

Q. Have you that opinion still?

3 A. To a certain extent I have.

Q. Very well. Now, then, you have?

A. Yes, sir.

Q. Would it take evidence to remove that opinion?

A. Yes, sir; evidence would change my mind.

Q. It would take evidence to change your mind, would it not?

A. Yes, sir.

Q. That is the only way you can get rid of that opinion, is it not, that you have formed, would be evidence, would it not?

A. Yes, sir; certainly. Of course that would be the only way.

Q. Then you start in with the case with an opinion against the prisoner?

A. I did not say that I had any opinion against the prisoner.

Q. Well, for him, then. It might be for him, might it not?

A. It might be.

Q. You won't say? We won't ask you as to that. I suppose I would have a right to know if I wanted to. But we are not particular about knowing it. But whatever way it is, it would require evidence to remove that opinion, would it not?

A. Yes, sir; to this extent, colonel, the newspapers were all full of it all the time. There is no man but what forms some opinion from that the papers state. I would have to hear facts in the case as a juror to be changed in my mind as to what the paper said about it.

Q. You would have to hear facts in order to change your opinion you formed at that time?

A. Yes, sir.

Q. It would take some evidence to change your opinion?

A. Yes, sir.

Mr. CLAYTON (of counsel for defendant). We submit to the court that the gentleman is disqualified as a juror in this case.

4 The COURT. You can go into the jury box and try the case by the law and the testimony?

A. Yes, sir.

Q. Is any opinion you have formed of such a character as to influence or bias your judgment in the least after you have heard the law and the evidence?

A. I think not.

Q. No opinion that would prejudice or bias your judgment upon what you have read?

A. No, sir.

Q. After you have heard the law and the evidence?

A. No, sir.

Q. You would be controlled exclusively by the law and the testimony in the case?

A. Yes, sir; I would.

The COURT. I think the juror is qualified.

Mr. CLAYTON (of counsel for defendant). We challenge him for cause, and save an exception.

The COURT. Yes, sir."

That the above and foregoing questions asked and answers made of and by the said Ed. Taylor were taken down at the time by Mr. G. E. Rider, the official stenographer of the court, and by him afterwards reduced to typewriting; that the answer "Yes, sir," on page 22 of the original record and page 12 of the printed record, in answer to the question "Have you any such conscientious scruples against capital punishment as would prevent your returning a verdict of guilty in a case where the law and the evidence warranted it, such verdict to be followed by capital punishment," should be "No, sir," as the original record embraced in the bill of exceptions now on file in my office shows it to be. The juror Ed. Taylor answered the question above set out "No, sir," instead of "Yes, sir," as contained in the printed record.

[L. S.] STEPHEN WHEELER, *Clerk*,
By J. M. DODGE, *D. C.*

We agree that the within transcript from the record may form a part of the record as though the same had been certified therewith.

HOLMES CONRAD,
A. A. Genl.
A. H. GARLAND,
Atty. for Starr.

6 (Indorsed:) Case No. 15,464. Supreme Court, U. S., October Term, 1893. Term No. 1080. Henry Starr, plff. in error, *vs.* The United States. Stipulation and addition to record. Filed March 12, 1894.

1080

Office Supreme Court, U. S.
+FILED+
MAR 16 1894
JAMES H. McKENNEY.
CLERK.

153-614

SUPREME COURT OF THE UNITED STATES.

HENRY STARR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF OF PLAINTIFF IN ERROR.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

—IN THE—

SUPREME COURT OF THE UNITED STATES.

HENRY STARR, Plaintiff in Error,

vs.

THE UNITED STATES.

BRIEF OF PLAINTIFF IN ERROR.

At the August Term, 1892, of the United States Circuit Court for the Western District of Arkansas, the Hon. I. C. Parker, District Judge, presiding, the plaintiff in error, Henry Starr, was convicted and sentenced to be hanged for the killing of Floyd Wilson, in the Indian Territory.

The killing occurred on the 13th day of December, 1892. Starr, the plaintiff in error, was then a boy aged between 18 and 19 years. (*Printed Tr., p. 83*). He was a Cherokee Indian. (*Tr. p.* ——) The trial was had on the 17th, 18th, 19th and 20th days of October, 1893, (*Tr. pp. 3-4*) Starr then being between 19 and 20 years of age.

The assignment of errors, (*Tr. p. 191*) sets up fifty-six distinct errors, which, it is claimed by the plaintiff in error, that the Court committed at the trial. Forty-eight of these go to the charge of the Court.

In the brief, we shall content ourselves by pointing out the errors and presenting arguments on but few of these grounds for error.

1. The first ground for error assigned is:

"Because the Court erred in excusing from service on the jury, James Bill, Simon Severe and Thomas W. Hamlin," [Tr. *p.* 1911].

Simon Severe on his *voir dire*, answered as follows:

Question. Have you any such conscientious scruples as would prevent your returning a verdict of guilty in a case where the punishment is death, if the law and evidence warranted such a verdict?

Answer. Only this; I am not altogether agreeable with capital punishment. I would not like to send him to capital punishment.

Q. You mean you do not believe in capital punishment?

A. That is a hard question. I could not say that I believe in it.

The Court: Are your views of such a character as to interfere with your conclusions? After you heard the law and the evidence, and it was sufficient to satisfy you beyond a reasonable doubt of guilt, would you find the party guilty of the crime of murder if it was to be followed by capital punishment?

A. I could do it, but I would be afraid of the hereafter—my own conscience; that is all; it would grind on me a little.

The Court: The question is whether or not it would influence or bias your judgment after you had heard the law and the evidence?

A. No, sir; it would not.

The Court: Would you convict if the testimony in the case proved the case in that way that the law requires it to be proven, would you be governed by the law and the evidence in the case of that kind and convict, notwithstanding your views on the subject?

A. Well, of course, it looks like if I was a law-abiding man I would have to do it.

The Court: You are a law-abiding man?

A. Yes, sir.

The Court: You would be governed by the law and testimony?

A. Yes, sir.

Mr. Clayton [of counsel for defendant.] We think the juror is qualified, and desire to save an exception to the ruling of the Court.

The Court: Yes, you can save an exception to the ruling of the Court.

This juror had repeatedly stated that his "views on capital punishment would not influence or bias his judgment after he had heard all the evidence." "That he would be governed by the law and the evidence in the case," notwithstanding his views. "That as a law-abiding man he would be governed by the law and the evidence." [*Tr. p.* 10) That if the evidence should be sufficiently strong to satisfy him, beyond a reasonable doubt, under the law, that he would be willing to convict, notwithstanding the death penalty. (*Tr. p.*11) And, then, because the Court finally had him say, "That *he was afraid his views* might bias his judgment, to the extent that he would be *unwilling* to *convict*," the Court held him incompetent. (Tr. *p.* 11).

It will be observed by reading the record, (*Tr. p.* 10.); that the Court, at an early stage of the examination, took the juror out of the hands of the District Attorney, and that after the juror had, repeatedly and most positively and certainly answered questions affirmatively, that would qualify him to sit as a juror in the case, the Court solemnly admonished him that he must answer honestly and not for the purpose of

shirking duties, etc., and when the juror was brought to express a naked fear that his views were such that he might not convict, the Court ceased to interrogate him and pronounced him incompetent,

Counsel for defendant were permitted to ask one question, but even that was not permitted to go to the juror as asked, but the juror answered it affirmatively and qualified himself, and it was the last answer he made until the fear was expressed. (*Tr. p.* 11).

We submit that this was error; that the Court should at least have required of the juror to state positively and affirmatively that his views on capital punishment were such as that he believed he would not be able to convict in a proper case for conviction, instead of holdnig him incompetent on a bare fear that he would not convict. Especially should this have been done after the juror had so often stated, in answer to interrogatories, put by the Court, and his first answer to the question put by the defendant's attorney, that his action would not be influenced by his views, and that he would be willing to convict on sufficient and legal proof.

Unless the fear expressed by him that he would be unwilling to convict, disqualified him, he nowhere disqualified himself, but instead, many times qualified himself as a juror in the case. The fact that he showed that he was a man of a tender heart, and that to

use his own language, "I am not altogether agreeable to capital punishment," (*Tr. p.* 10) is not sufficient to disqualify him; there must be something more.

2. The next juror examined was Edward Taylor. This juror stated that he had formed an opinion as to the guilt and innocence of the defendant; that it would take evidence to remove, but notwithstanding that fact, he could go into the jury box and try the case by the law and evidence, and without bias or prejudice. (*Tr. pp.* 11, 12 and 13.)

We submit, that while there are many cases sustaining the ruling of the Court, that such an opinion does not disqualify, yet we believe that all such, or nearly all will be found to have been decided that way, because of a Statute specifically declaring that such an opinion shall not disqualify the juror. The very fact that in these States, which hold to the doctrine, it becomes necessary to pass Statutes to that effect, is the strongest argument that can be made, that without the Statute such an opinion would disqualify. There is no such Act of Congress, and therefore the rule of the Common Law, which holds such opinions to disqualify prevails in the United States. And this is the law of Arkansas, in which State this Court was holden. (Sylvester and Henry Polk v. State 45 Ark. 169.) In the case cited the Supreme Court of Arkansas says:

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Under the ruling in Atkins v. State 6 Ark. 568, the granting of this juror was clearly wrong, and Atkins v. State simply decided under the statute of Ark. what the Courts of the Country recognize as sound doctrine upon this subject, regardless of any statute, which Am. & Eng. Ency. of Law, 2d and revised Edition § 3020 (4)

"Our bill of rights, guarantees to all persons accused of crime the right to a trial, by an impartial jury. Here four persons were declared to be competent to sit as jurors in a capital case, when by their own statements, it appears that they had formed opinions as to the guilt or innocence of the defendant, *which it would require evidence to remove.* In other words, they admit that they had prejudged the case, and they would go into the box with a leaning for or against the prisoner. That a juror has formed any opinion in such a case renders him *prima facia* incompetent, and it is for the State to show that such opinion is based on rumors, and *not* of a *nature to influence conduct.* But one who leaps in advance both of evidence and the law, and settles in his own mind the question of guilt, is not fit to be a juror in the cause. The jurors must be indifferent between the State and the prisoner. The *burden* of *eradicating preconceived* opinions upon the merits ought not to be cast upon either party. The fact that the *jurors further said that they could try the case impartially was entitled to no consideration* in the face of their admission that their minds were preoccupied by impressions of the case."

If it takes evidence to remove an opinion that a juror may have against a prisoner, in order that he may be placed in a condition of mind that he would commence his investigation of his guilt or innocence, without any opinion, it might be that if he had started without any opinion, that just the amount of evidence that was necessary to use by the prisoner to overcome the previously formed opinion would have been sufficient to have raised a reasonable doubt in the jurors mind

of the prisoner's guilt, or to have satisfied him of his innocence. And it matters not how that opinion was formed.

The Third assignment of errors is:

"Because the Court erred in admitting in evidence, the warrant of arrest purporting to be issued by Commissioner Wheeler, for the arrest of Henry Starr, Edward Newcomb, Jesse Jackson and Ben Benjamin, dated 18th of November 1892." (*Tr. p.* 191.)

The Court declared this a legal writ, permitted it to be introduced in evidence, and over defendants objection read it in his charge. (Third and thirtieth assignment of error.) (*Tr. pp.* 191 and 199.)

This writ is set out in full on pp. 16 and 17 Tr., in the testimony of Dickey. This writ states that the complaint on oath had been made before Commissioner Wheeler, charging that Starr and the others had committed the crime of "*Larceny in the Indian Country*," then follows the command in the name of the President of the United States to apprehend them and bring them before the commissioner. etc., and this writ closes as follows:

"Given under my hand *and Seal*, this 18th day of November, 1892, in the 117th year of our Independence."

Signed

"STEPHEN WHEELER,
"Commissioner U. S. Court,
Western District of Arkansas."

It is Without Seal.

The writ, it will be observed, purports to be under *Seal* of the commissioner, and was issued for persons alleged to have committed crime in the *Indian Country*. (*Tr. pp.* 16-17.) The government claims in an attempt to serve this writ *in the Indian Country* that the killing occurred.

If the law requires such writs to be under seal, then this writ was void, and gave the officer no authority to make an arrest under it.

Wharton on Homicide, Sec. 248.

Wharton's Criminal Law, Sec. 424.

We submit that the law of the United States required such a writ to be under seal, and if that is not the law, it requires, at least, that the writ shall be signed by some person authorized to issue the writ; and that the officer's official designation must properly appear on the writ itself. In other words the writ must prove itself. Proof *aliunde* that the person signing the writ is an officer having authority to issue it when that fact does not appear on the writ itself, will not be allowed.

This writ is signed by Stephen Wheeler, "Commissioner U. S. Court." The Revised Statutes, U. S., Sec. 627, gives to these officers an official designation a name by which they are to be known and called; it says:

"Each Circuit Court may appoint, in different parts of the District for which it is held so many discreet persons as it may be necessary, who shall be called "Commissioners of the Circuit Court," and shall exercise the powers, which are or may be expressly conferred by law upon Commissioners of Circuit Courts."

"Commissioner U. S. Court" as on the writ, is a very different name from "Commissioner of the Circuit Court." There is no such officer known to the law as Commissioner U. S. Court, and this is not a mere irregularity or imformality, it goes to the very life and validity of the writ.

Especially must this be true, when the writ is without seal, or any other ear mark to designate the official character of the officer who issues it. The designation of the officer given by the law informs the party sought to be arrested, and the world, that the officer issuing the writ is a commissioner of the Circuit Court, a Court having authority to appoint him, and confer upon him the power to issue the writ; the official designation on the writ gives no such information. If the party sought to be arrested has intelligence enough to know that U. S. is an abreviation for United States, and not Uncle Sam, there is nothing to inform him of what United States Court he is commissioner. It maybe that he is acting under a commission issued by the District Court, a court having no power

to appoint such commissioner. He is not told where to look for the authority from which the commissioner's appointment and powers eminate.

Many other United States Courts may appoint commissioners.

The Court of Claims can do it. *R. S.* 1070.

The District Courts can do it. *R. S.* 570.

But the Commissioners of the District Courts have no authority to issue writs of arrest and take bail, and inasmuch as these District Court Commissioners are not specifically named by the Statute, "Commissioner U. S. Court for Western District of Arkansas," as in this writ, would be a very proper and appropriate designation for them. From the face of the writ how can it be known that Stephen Wheeler had authority to issue it Before that fact can be known, proof *aliunde* must be introduced. He may have been only a commissioner appointed under Sec. 570, R. S. by the District Court, an officer with no power to issue such a writ. If this contention be true it matters not whether the law requires the writ to have been under seal or not. It was void. But we further contend that the writ should have been under seal.

The only Statute of the United States relating to this matter is Sec. 1014 R. S.

This section provides that the officers therein named, including "Commissioner of a Circuit Court,"

may cause the arrest and imprisonment, and admit to bail any person criminally offending against the laws of the United States. And in case that the offender may be *found* in any of the States of the Union, then the *process* is to be agreeable to the usual mode of process in such *State*. Not the mode of process of the State in which the Court may be *situated*, but the mode of process in the State where the *offender is found*. But the Statute is silent as to the mode of process in criminal cases, if the offender shall be found outside of any State, and at a place over which the United States shall have sole and exclusive jurisdiction. No where do the Federal Statutes name the kind of process to be used in such cases.

Section 1014 R. S., is a part of the original judiciary act, establishing the courts of the general government, enacted in 1789, just after the adoption of the Federal Constitution, and the formation of the Federal Government. (1st Statutes at Large p. 91.) As to persons charged with crime *found* in the States, the process that might be adopted by the particular State in which these persons *were found*, was to prevail, but as to all other persons the Statute is silent, the process, as to them, therefore, as it then existed and was known to the Legislature, was to continue, that is, process fixed and established by the *Common Law* of England. They knew none other. And the Statute

has never been changed. What it was then it is now.

What was the Common Law then and what is it now?

Blackstone, Vol. 3 p. 273, Sharwood's Edition, in describing a warrant in a civil case says:

"It is a mandatory letter from the King, in parchment, Sealed *with His Great Seal.*" The same author, in Vol. 4, of the same edition, p. 280, in describing a warrant of arrest, that the laws of England, authorized a Justice of the Peace to issue, says:

"This warrant ought to be under the hand and *seal* of the justice; it should set forth the time and place of making, etc."

Bouvier in the 2nd Vol. of his law Dictionary, under the heading of "Warrant" says: "A warrant should regularly bear the hand and *seal* of the justice," etc., Mr. Wharton in his work on Criminal Law says: 1 Vol. Sec. 424, p. 425.

"At Common Law if a warrant have no *seal* it is void. If an officer attempt to arrest the party named upon such authority, he proceeds at his peril, and is a wrong doer. And if he be killed in the attempt by the party, the slayer is guilty of manslaughter, and not of murder." [See cases cited, note 4, to above citations.] The same author in his work on Homicide, (p. 249, Sec. 248.) says:

"If a warrant commanding the arrest of an individual in the name of the State have no *seal*, it is void. If an officer attempt to arrest a party named upon such authority, he proceeds at his peril, and is a wrong doer; and if he is killed in the attempt by the party, the slayer is guilty of manslaughter, and not murder." See also precedent and form of warrant in "Roe's Criminal Procedure," page 118. The form has both *Seal* and proper designation of Commissioner.

We think the above authorities settle the fact that at the Common Law a warrant was void unless it had upon it the seal of the officer authorized to issue it, and by the Statutes of 1789, Sec. 1014 R. S. no change was made in the process as it was known to the Legislature of that time, except when the accused was to be arrested in a state. The United States has sole and exclusive jurisdiction over the Indian Country, no State authority extends over it. The writ alleges that the offense, upon which it is founded, occurred in the Indian Country, and Floyd Wilson was killed in that country, while endeavoring, it is said, to serve the sealless writ there.

We submit it was an error to admit the writ in evidence, and that it was error in the Court, in his charge, to read it to the jury, with the comments that he made upon it. [*Tr. p.* 155.]

4. The next point to which we desire to direct the

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And the statutes of Arkansas are very rigid on the subject of the necessity of seals to all writs that issue from any judge or justice of the peace, secs. 5304, 5305, 5306, Ark's Dig. 1884; Woolford v. Duggan 2 Ark's 131;

attention of the Court is that contained in the fourth assignment of error. (*Tr. p.* 191.)

The government witness, Arthur Dodge, on his examination in chief, was asked by the District Attorney to state a conversation had between the witness and the defendant, which the witness claimed to have had with him some two weeks after the killing. The witness gave the conversation and without any effort on the part of the District Attorney to get from him a different version or any apparent attempt on the part of the witness to conceal any fact, or any apparent failure of memory. The District Attorney was permitted to ask the witness the following questions:

Q. "I will ask you, did not he, Starr, did he not state this, in order to refresh your memory. Did he not state to you? "I hate like Hell to have to ride your horse off, but could not do any better. I was afraid the whole damned country was alive with marshals"?

A. Yes, sir.

Q. "I took you and Miller to be marshals"?

A. Yes, sir.

Q. "I will ask you if he did not say this in addition? "After this I don't want you to let any damned marshal get on your horse as long as he lives. Your horse is what fooled me. I thought it was some of you boys coming out there"?

Q. "I will ask you if he said this in addition?

"That is what fooled me. I never knew any difference until he got pretty close to me."

"Yes, sir." (Tr. pp. 73 and 74.)

When it is remembered that this alleged conversation relating to what took place at the killing, and one of the most important questions in the whole case, was: "Did the defendant know that Floyd Wilson was an officer, or marshal?" It will be seen that perhaps the most important and most damaging testimony offered by any witness was procured by the process of leading questions, by which the conversation was put in the witness' mouth, and the affirmative answer "Yes, sir," procured. When this was objected to, the reason given by the Court, why it was competent, and the only reason, was that the District Attorney "Had a right to *refresh the witness' memory.*" This reason was assigned four distinct and different times at the trial and was the only one given. (Tr. pp. 63 and 64.)

The Court in overruling the motion for a new trial, some weeks later, (Tr. p. 188) undertakes to assign other reasons. No impartial man can read the testimony of Arthur Dodge, or any other of the government witnesses, and say of him or them, that they were unwilling witnesses or that they were favorable to the defendant, and the further fact that those reasons were not assigned at the trial, but were left to be given by the Court, after the effect of this method of obtain-

ing that evidence became apparent, very much weakens the position taken by the Court in overruling the motion for a new trial. The Court says: That Arthur Dodge, the witness was a truthful man, but the Court further says: "That it is manifest from some cause or another, witnesses were not willing to readily disclose what they knew in the case." (Tr. p 188.) If Arthur Dodge was a truthful man, and he so impressed the Court, and he was sworn to tell the whole truth, there was no necessity for leading questions.

5 The fifth assignment of error is:

"Because the Court erred to the prejudice of the defendant in refusing to give instruction number one asked for by the defendant." (Tr. p. 191.)

This instruction is as follows:

"The Court instructs the jury that although an officer, or one aiding an officer, in making an arrest, may have the lawful authority to make the arrest, yet if such person or officer, in attempting to make the arrest, act in such a wanton and menacing manner as to threaten the accused with loss of his life, or some great bodily harm, to prevent which the accused fired and killed the person or officer, the killing would be justifiable." (Tr. p. 120.)

This instruction was refused by the Court, and

nowhere in all of the 34 pages of the charge, is it, or its equivalent given.

But on the contrary the Court in its charge, (Tr. p. 165) says: "I have been asked by the counsel for defendant to make certain declarations of the law, some of them have already been given substantially. As qualified by the charge of the Court, they are given, standing alone, without being modified, they would not any of them be law, in my judgment."

We think the first instruction asked for by defendant was clearly the law. (Jones v, State of Texas 26 Tex. Appeals 1, and Am. St. Rep. 454.)

1 Wharton's Criminal Law, Secs, 408, 413.

Wharton on Homicide 216.

Wharton on Homicide 226.

The first case cited above, clearly and almost in the exact language of the instruction lays down the law, as asked by defendant, in the first instruction. And we think that every well considered definition of murder, in killing an officer in resisting an arrest, the qualifying words: "*That the Officer must be using the proper means*," for the purpose of making the arrest will be found. Mr. Wharton, quoting from Sir Wm. Russell, uses and adopts the following language: "That when persons having authority to arrest or imprison, *using the proper means for that purpose*, are resisted in so doing and killed it will be murder," etc.

Wharton on Hom. 226.

Mr. Wharton again says: "An arrest, not unlawful in itself, may be performed in a manner so criminal and improper, or by an authority so defective, as to make the party performing it, and in the prosecution of his purpose, causing the death of another person, guilty of murder. In all cases the officers ought to proceed with due caution."

Wharton on Hom. 216.

Wharton's Criminal Law, 208.

In the case of Jones vs. The State of Texas [26 *Tex. App. 1. 8th Am. St. Rep. 456.*] The Court says:

"Whether the arrest be legal or not, the power to arrest may be exercised in such a wanton and menacing manner as to threaten the accused with loss of life or some bodily harm. In such a case, though the attempted arrest was lawful, the killing would be justifiable."

And on principle this exposition of the law must be correct, otherwise an officer might in every instance shoot down the party sought to be arrested, and bring in his body dead, rather than alive. A wrongful and unnecessary effort on the part of an officer to take life in an attempt to arrest, if he succeed is unquestionably murder in the officer, and can it be true that the intended victim cannot defend himself against murder? And if in saving his life in defending against

such an assault, he kill the officer, is it possible that he cannot appeal, at his trial, to the law of self-defense? Certainly he can. Hence the instructions asked for ought to have been given. The only ground on which the Court refused it was: "That standing alone it was not the law." [Tr. p. 165.] It was not claimed by the Court, nor in the face of the evidence can it be properly claimed, that it was abstract or that there was no evidence on which to base such instructions.

The testimony of the eye witnesses is to the effect that the deceased was a private citizen, whose only authority to act as an officer was an employment by a detective by the name of Dickey, who had recently procured a deputy marshal's commission. That deceased was to have his expenses paid and get any reward that might be offered, (It does not appear whether the reward was for the boy's body dead or alive.) and whatever fees might be made out of it. [Tr. pp. 19, 31, 33, 34.] He was not employed as a posse, under Sec. 2153 of the Revised Statutes of the United States, which provides that possees may be employed by the marshal in the *States* to go into the Indian Territory, etc. The deceased was employed in Wagoner, in the Cherokee Nation, and was never registered as a posse. [Tr. p. 32 and 34.] Both Dickey and the deceased were strangers in the country, [Tr. p. 81] and it does not appear that either of them wore

any badge of office. As a matter of fact they did not. Dickey had never seen the defendant but once (Tr, p.31) and the deceased was a stranger to him. The defendant was an Indian by blood, and had just turned his 18th year, and about 11 o'clock, a. m., was quietly riding across the prairie in the Indian Territory, with a gun in his hand. The deceased and the detective Dickey, were hidden at the house of Arthur Dodge, first in a hay loft, and then in a smoke house. Defendant was passing the house about 400 yards away, when suddenly, and without warning, the deceased, armed with a Winchester gun and a pistol, rode down upon him, to within one hundred yards of him. The boy was evidently startled. The two jumped from their horses and stood facing each other a short time and were talking, when the deceased suddenly sprang to his horse again and rode rapidly up to within 25 or 30 feet of defendant, who made no effort to flee, but stood his ground. Neither did he make any effort as the deceased rode up so close to him to shoot. No witness testifies that during that time he raised his gun. The deceased was not stopped by the defendant, but when within 25 or 30 feet of defendant, he, the deceased, suddenly stopped, sprang from his horse, and while defendant had the muzzle of his gun toward the ground, deliberately fired a shot at the defendant, who up to that time had made no demonstration either

of resistance or flight. [Tr. p. 82 and 83.] Then a fight began which resulted in Wilson's death. The government witness Padgett swore to the above state of facts, and he was corroborated in almost every material statement, by all other of the eye witnesses except Dickey, who contradicted everybody. All agree that Wilson fired the first shot. And all agree that during the time that Wilson was riding up to defendant the last hundred yards, that the defendant did not raise his gun, nor did he make any effort or demonstration to stop Wilson, and that, therefore, Wilson did not stop and get off his horse and commence shooting because of anything that defendant had done. It was also shown in evidence that Wilson called at Mrs. Lindseys two nights before where he kicked in the door, in the night time, while they were in bed, [Tr. pp. 35, 36, 37 and 127.] He was always in the lead although working under Dickey. It was also shown that Dickey and Wilson were not working for the Government, but for the Pacific Express Company. On page 31, transcript, Dickey says: "I was special detective for the *Pacific Express Company*, and had been for 11 or 12 years;" and on page 24, transcript, he testified, that this Express Company had offered a reward for defendant's capture, and that Wilson was to get all rewards, and that he, (Dickey) was to pay all of his expenses. The two men, then,

were working in the interest of an Express Company, which had offered a reward for the defendant, whether dead or alive, no one testified; but from the zeal and recklessness, and the unwarranted firing on the defendant, the former might well be presumed.

Taking these facts altogether, they certainly tended to prove not only "A wanton and menacing manner," toward the defendant, "threatening his life," but they show an actual and an unwarranted attempt on his life.

The defendant certainly had the right to have the question submitted to the jury, whether he had the right, under the law, to return Wilson's shot, although he, the defendant, might have known he was an officer, and that he was in possession of the proper process. And we contend that the refusal to give the instructions by the Court was reversible error.

D. Bark. Ol. In. 36, 90-2, 533.

6. The sixth and seventh grounds set up in the assignment of error, are: "Because the Court erred in refusing to give instructions 2, 3 and 4, asked for by defendant, and in modifying the same." [Tr. p. 191.]

The second instruction, as asked for, was as follows:

"If the jury believe from the evidence in this case, that Floyd Wilson, the deceased, had the lawful authority to make the arrest of defendant, yet if deceased, in making, or attempting to make the arrest, acted in such a way as to endanger the life of the de-

fendant, or to threaten him with great bodily harm, when the defendant was neither fleeing or resisting the arrest, then the defendant would have the right to defend himself, even to the extent of taking the life of the deceased, if necessary." [Tr. p. 130.]

The Court refused to give this instruction as asked, but added the words:

"Provided the defendant was neither fleeing, nor preparing to flee, by standing the officer off by acts of threatened violence." [Tr. p. 101.]

We think the defendant had the right to have had the instruction given as asked. While the addition does not materially change the instruction, it might well have had the effect to divert the minds of the jury from the particular condition of the case that the instruction was intended to cover to that to which the Court had already in his instruction given so much prominence, to-wit: The standing before the officer with a gun. (Tr. pp. 143, 144, 145, 152, 153, 154, 157, 158, 159, 160, 161, 162, 163 and 164.)

The jury was told by the Court that the instruction standing alone, *without being modified*, would not be law, (Tr. p. 165.) and then proceeded to modify it, so as not to improve it, but to simply give prominence to that part of the instruction relating to fleeing or resisting arrest. We submit this was error.

7. Instruction number three asked for is as follows, to-wit:

"The Court instructs the jury, that if the defendant, being placed in a position in which his life was imperiled, slay an officer, of whose official character he had no notice, this is homicide in self-defense, if the killing was apparently necessary to save defendant's life, nor does it matter that the officer was legally seeking to arrest the defendant, the defendant having no notice of that fact. If the jury believe from the evidence that the defendant was placed in a position at the time of the killing in which his life was imperiled by the deceased, and he slew him without having any notice of his official character, and the killing was apparently necessary to save defendant's life, then the killing of the deceased was a homicide in self-defense, nor does it matter that the deceased was legally seeking to arrest the defendant, if the defendant had no notice of the fact." [Tr. pp. 136 and 131.)

The above is either the law or it is not the law. If the law it ought to have been given without so distorting and mutilating it, that its author would not recognize it.

The instruction as asked for is in the exact language of Mr. Wharton in his criminal law. (Wharton's Criminal Law, Sec. 419.) And the author after using the language of the refused instruction adds:

"Nor should it be supposed that this exemption from distinctive liability, in case where the officer's official character is not known, is founded on technical reasoning; not only is it essential to the rights of the citizen that he shall be required to submit to arrest only when the official character of the demand is made

known to him, but it is essential to the dignity of the State that its servants should be sheltered by these prerogatives only when they are acting legally, and give notice that they so act." (Wharton's Criminal Law, Sec. 419.)

The Court enlarged and modified the instruction so as to say:

"The Court instructs the jury that if the defendant, being placed in a position in which his life is imperiled, slay an officer of whose official character he has no notice, or *had no reasonable grounds to know his character* this is homicide in self-defense, if the killing was apparently necessary to save the defendant's life, nor does it matter if the officer was legally seeking to arrest the defendant, the defendant having no notice *of the facts, no reason to know what the purpose of the party was. Provided the defendant did not by his threatening and violent conduct prevent the officer from making his character and mission known. This is given in connection with the principle I have given you (that if a man stands up and obstructs arrest, prevents arrest, armed with deadly weapons, and uses them in a way that is threatening, then the officer has no time, nor is he called upon to make proclamation. The officer can stand on the defense and overcome the danger and take his man or overcome him by violence, if necessary.)*

"If the jury believes from the evidence that the defendant was placed in a condition at the time of the killing in which his life was imperiled by the deceased, and he slew him without having any notice of his official character, and the killing was apparently necessary to save his own life, then the killing of the deceased was homicide in self-defense. Nor does it matter that the deceased was legally seeking to arrest the defendant, if the defendant had no notice of the fact,

or no reasonable grounds to know that he was an officer.

"It is not necessary to know that it is Floyd Wilson, but an officer. But if the defendant prevented Floyd Wilson from giving notice of his character of mission by threatening or violent conduct, then of course, he would not be required to give notice. He can stand, as upon the other proposition, on the defense. These propositions are given on the theory; that if youbelieve that no proclamation was made, if proclamation was made, then the defendant had express notice of it." (*Tr. pp. 132 and* 133.

The italics in the above instruction, indicate the addition and modification made by the Court,

In the modification of this instruction the Court evidently confounds the rights of the defendant with those of the deceased. If a man who is not an officer and not attemping to arrest me, armed, and a stranger to me, approaches me with a deadly weapon in a manner to indicate danger to me, may I not "Stand Him Off?" Is it not my duty to use threatening demonstrations toward him, warning him to stand back? And if he stop and fire on me may I not return the shot? And if I may do so to one who is not an officer, may I not, under the same circumstances, do so to one who is an officer, but whose official character is unknown to me? Or, if you please, one of whom I had no reasonable grounds to believe to be an officer, attempting to make an arrest. Under such circumstances, what has my threatening conduct to do with my right of self-defense?

It might justify the officer in acting more hastily,

but the officer was not on trial. I might act too hastily myself, or do other unlawful things, but that is not the question here.

Besides the above objection we contend that there was no evidence in this case upon which to found an instruction, upon the question of the deceased having been prevented from making known his official character and mission by the threatening conduct of defendant.

All of the witnesses who saw the killing and testified anything about it, say that the men stood face to face, talking for some time before the deceased got on his horse the second time and rode up to within 25 or 30 feet of the defendant. Take the testimony of Arthur Dodge. (Tr. pp. 58 and 59.) We quote this witness because the Court "thinks he was a truthful man." [Tr. p. 188.]

Question. "Tell what occurred, what you saw?

Answer. "I saw Wilson (deceased) ride up pretty tolerable close to Henry [defendant]. I could not tell just exactly how close to him, stop and get down, and they stood there, looked like they were parleying awhile, talking apparently.

Q. "Was Starr off his horse?

A. "Yes, sir; he got off about the same time that Wilson got off; Wilson got off and he got off.

Q. "Could you hear what they said?

A. No, sir

Q. Could you tell that they were talking?

"*Yes, sir*; I could tell that they were using words, that there was words going on between them, but I could not tell what it was.

Q. "You could hear them talking, could you, but could not distinguish the words?

A. "Yes, sir; I could hear a conversation going on between them, but I could not tell what was said at all."

Q. "State what occurred then?"

A. "They stood there parleying awhile, apparently, and then Henry looked to me like he was trying *to work off away from Wilson*, and he looked to me like he had gone three or four steps, and then Wilson got on his horse and rode right up close to him, and got down again. He got on the horse that he had got down from the second time."

Q. "What occurred then?"

A. "They stood there *parleying again*, apparently, for a second time."

John T. Padgett, another Government witness, states substantially the same facts. [Tr. p. 76.]

Even Dickey, the detective, says about the same thing. [Tr. p. 25.] Dickey's testimony.

" " * * * When I got started Starr and Wilson looked to me like they were not over 60 or 80

feet apart; I should judge about 80 feet apart, or 60, somewhere along there; a very short distance.

Q. "Were they on horeback or on the ground?

A. "They were on foot. Each one appeared to be holding his bridle rein over his arm.

Q. "Were they standing still or moving?

A. "No, sir; they were standing still.

Q. "What occurred then; what length of time did they stand in that position?

A. "But a very short time; a second or two, or a minute. *They appeared* to be talking; and Wilson finally threw his gun to his shoulder and fired.

Q. "What position did Starr have his gun in?

A. "*He had his gun rather down* in that position. (Indicating.)

Q. "Holding it down?

A. "Yes, sir.

A. "Both hands?

A. "Yes, sir; and Wilson fired the first shot." (Tr. p. 25.)

As above stated this witness was the detective, and the Deputy Marshal, and of all the witnesses the one most prejudiced against the defendant. And, as will be seen, he is only telling about what occurred after the deceased had gotton from his horse the second time, after he had ridden close up to the defendant, but he says, even then, they "seemed to be talk-

ing, and at the time of the first firing by the deceased, defendant's gun was pointing down.

Emmett Miller, another eye-witness, but somewhat deaf, says he heard them talking. (Tr. p. 86.)

Mrs. Padgett even goes so far as to tell what she claims was said, and that the notification was given, (Tr. p. 88.) Of course this was disputed by the defendant, but that makes no difference, so far as the present question is concerned.

These were all of the eye-witnesses, and every one of them state a condition of affairs in which the deceased had every opportunity to proclaim his official character and mission, about that there can be no dispute. That he was not prevented from doing so by defendant, there can be no question or possibility of doubt. Then why this oft repeated instruction? "If the defendant by his threatening and violent conduct prevented the deceased from making his character and mission known." That the officer was under no obligation to do so and the defendant could have no advantage of the fact that he did not do so?

Instructions should be based upon the testimony, otherwise they are abstract and misleading, and yet the Court, without an iota of evidence to support the instruction or modification, had already, three different times, fully and at length and on its own motion, so modified his own charge, that it was the duty of

the officer to give notice, but he need not do so, if he be prevented by the violent and threatening conduct of defendant. (Tr. pp. 156, 157 and 162.)

The Court again, in the modification of this instruction, tells the jury the same thing, and in its modification of the next (fourth) instruction asked for by the defendant for the fifth time reiterates it. And with the exception of the law of reasonable doubt, it was the last word uttered on the law of the case. The jury retired with the defendant's instructions so mutilated that they could not understand its purpose or effect, and with this objectionable declaration for which, in the evidence, there was no foundation, ringing in their ears.

The fourth instruction was modified by inserting the same thing and is subject to the same objections.

The eighth exception goes to the charge of the Court. (Tr. p. 191.)

This charge occupies 34 pages of the printed transcript. It took two hours and forty minutes to deliver it, and there were forty-six errors assigned to it. (Tr. pp. 191 to 263.)

We will notice but a few of them.

The twenty-first assignment of error. (Tr. p. 195.) is: "Because the court erred in instructing the jury as to the law of self-defense."

The instruction as to the law of self-defense, as

set out in the 24th, 25th, 26th and 27th assignment of error, [Tr. pp. 196, 197, and 198.] and the definition in the charge commences with page 148 and ends on page 162, transcript. We will not repeat it all. We complain that the Court erred in its statement of the law in this: that it set up too high a standard of right of which the defendant must have been possessed at the time of the killing. For instance, on page 148 transcript, near the bottom of the page, the Court says:

"I say to you it contemplates a state of actual danger, real danger, in this case to this defendant at the time of the killing, springing from the hands of Floyd Wilson, and a danger that he [defendant] did not create, or bring into existence by a wrongful act of his, because when we undertake to enter upon the execution of as grave a design as the taking of the life of individuals we must enter into it with *clean hands* and a *pure heart.*"

Just before giving the above instruction, on page 148, transcript, the jury are asked "to note every word and sentence, because there is not a word or a sentence in it that is not pregnant with meaning." And the Court says:

"I say then, we must enter upon the execution of this grave act upon our part with *clean hands* and a *pure heart* or as this law expresses, it, we *must* be *in the lawful pursuit of our* business. It says, that a man

who is in the lawful pursuit of his business—that means doing what he *had a right to do*—in the right at the time—is attacked by another under circumstances which denote an intention to take away his life, or, it may be, to do some *enormous* bodily harm, may lawfully kill the assailant—when?—provided he use all the means in his power, otherwise, to save his own life, or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power, Now, that is the first proposition of the law of self-defense. Now, let us see again, by enumerating each condition that must enter into it, what they are. First, we *must be in the right;* we *must be doing what we had a right to do* at the time of the killing, and when we are so situated we were attacked by another. How? What sort of an attack? Why, under circumstances which denote from the character of the act and the way it is done, an intention to take away our life or to do us some *enormous* bodily harm, under such circumstances, provided, still, we did not bring on the conflict by a wrong upon ou part which would necessarily and naturally precipitate it, under such circumstances we may lawfully kill the assailant, provided we use all means in our power otherwise to save our lives, such as retreating. That is what the law says. We frequently hear it said in argument, that that is not manly. It is not

manly to save human life when we can do it? It is not manly to obey the golden rule? It is not manly to obey the laws of your country when they say in thunder tones everywhere, that before taking human life, though the man whose life is taken may be in the fault, we must do everything that we reasonably can to prevent that last resort, that last thing we can flee to? We must avoid the necessity for it if we can. We must use less violent means than that which would produce death if we can in that way take away the danger. Now, in this case, this contemplates as far as this case is concerned, that at the time that Floyd Wilson was killed that this defendant *was in the right*; that he was *doing exactly what he had a right to do*, and when so situated he was attacked by Wilson in such a way as to indicate a deadly purpose, upon his part. About that there can be no question—that is to say, if Wilson shot at him, shooting at a man is evidence of deadly purpose, and when that transpired, if he could not by the exercise of any other reasonable means, or doing of any other reasonable act, such as surrendering to the officer, such as by his action, taking away the necessity of exercising of any more force, that he could not do that and stop the difficulty, or that he could not do it by avoiding the condition that existed, or that he could not do it by exercising less violence than he did exercise, he could kill Wilson;

but there must be an absence from the case of these propositions before this principle of the law of self-defense can be applied at all to the case. "He *must be in the right, he must be doing* what he *had a right to do.*"

We say that this is not the law. The law does not require a man to have "clean hands and a pure heart," and "to be doing *exactly* what he had a right to do," before he can repel a deadly assault made upon him by another.

Just before the above declaration of the law was given, the Court had told the jury that if a defendant is so far in the wrong, that he had by his wrongful conduct, brought about the condition that led to the assault, he could not invoke the law of self-defense. (Tr. pp. 148 and 149.) But now the Court goes further, and tells the jury that at the time of the killing the defendant must have been *doing exactly* what he had the right to do, and "That he must have been doing what he had a right to do, is repeated over and over again, and without any qualification. The jury are twice told that the defendant must have had "Clean hands and a pure heart." The jury might well have found that the defendant did not have "Clean hands and a pure heart," after the Court had substantially told them that he was a fugitive from justice, a felon and a horse-thief. (Tr. pp. 155, 162 and 163.)

If a man must have "Clean hands and a pure heart" and "be doing exactly what he had the right to do," before he can repel a deadly assault, then the very best of us could hardly ever be in a condition to invoke the law of self-defense. If that doctrine be the law, I may with impunity shoot down my enemy, if I catch him violating the Sabbath, using profane language, drunk and disorderly on the streets, or doing any other wrongful thing, and he dare not repel me; for by the charge of the Court he is cut off from the law of self-defense.

It was proven on the trial that the defendant had broken a bail bond and was trying to evade the officers, and the Court told the jury that if he had forfeited his bail bond and was evading arrest, he was a fugitive from justice "and the jury would consider it." (Tr. pp. 162 and 163.) If he was avoiding arrest at the time of the killing, after having forfeited a bail bond, he was doing wrong. He was not doing "Exactly right." He did not have "clean hands and a pure heart," and therefore, by the charge of the Court, he was cut off from the law of self-defense.

It may be said that the Court did not mean it; that the Court intended to qualify it. The answer to that is: "The Court said it, and the Court did not qualify it."

It should be remembered that the Court was in-

structing laymen; that he was talking to men who came from the common walks of life; men who were not versed in the technical use of words, but took, and understood them as they fell from the lips of the Court, and then he was instructing them as to their duty in a matter in which they were to pass on human life, and in such a case courts must be careful in their selection of words, so that no wrong impression may be gotten by the jury. If the jury took the Court at its word, and acted in this particular on what it said, they could have, under the evidence in this case, believed a state of facts upon which the defendant might have been convicted by them, and yet have been an innocent man, and who knows but that the jury, or that some member of it, may have been led to his verdict by this very consideration.

It will be seen from the part of the charge above quoted, (Tr. pp. 145 and 150) that in defining the law of self-defense the Court everywhere hedges the defendant about with all manner of conditions and provisions. The jury are twice told that the defendant must have had "clean hands and a pure heart." They are repeatedly told that "He must have been in the right;" that he must have been in the lawful pursuit of his business;" that "he must have been doing *exactly* what he had a right to do," and this last declaration is clinched, and further impressed on the minds

of the jury, by the declaration "About that there can be no doubt." They are told that the law of self-defense could not be invoked by defendant after Floyd Wilson had shot at him, "if he could, by the exercise of any other reasonable act, *such as surrendering* to the officer, such as by his *action taking away the necessity* of exercising any more force, that he could not do that and stop the difficulty, that he could not do it by *avoiding the condition that existed*, or that he could not do it by exercising less violence than he did exercise." And all this after deceased had *shot* at him. (Bottom p. 149 Tr.)

In the same exaggerated strain great bodily harm is called "*enormous* bodily harm," etc. Mark the contrast in the language and the evident manner of the Court when it leaves the subject of self-defense as applying to the defendant, and warms up to the subject of self-defense as applying to the deceased.

"The law of self-defense," says the Court, (Tr. p 151.) "did not belong to the defendant alone, but it belonged to Floyd Wilson as well as the defendant, and it was thrown around him as an officer to the highest degree, provided that he is in the proper exercise of his duty. It surrounds him at the time and the place when he enters upon the performance of his duty, from that time he is panoplied with the whole power of the law of self-defense.

"How unjust, how cruel, what a mockery, what a sham, what a bloody crime it would be upon the part of this government to send a man out into that Golgotha of officers, and command them in the *solemn name* of the *President* of *the United States* to execute these processes, and say to them, men may defy you; men may arm themselves and hold you at bay; they may obstruct your process; they may intimidate your execution of it; they may hinder you in making the arrest; they may delay you in doing it by threats of armed violence upon you, and yet I am unable, as chief executive of this Government, to assure you that you have any protection whatever. It is for you, gentlemen of the jury, to say whether the rule invoked by argument in the defense as to the character of these laws, and as to the rights and duties of these officers, is the law of this case, or whether it is to be found as declared by the solemn declaration of this great compact in the shape of the laws which bind the people of this country together, and which makes them a harmonious, united and common people, *harmonious* and *united* in their desire to uphold and enforce the law against all *violators* and all *offenders* of it. (Tr. p. 152.)

Again on page 155 transcript, the Court says:

"Wilson and the officer, then, had legal authority to enter upon the mission they did enter upon. And

what was that? What was this posse to do? What was he commanded to do? To go into the Indian Country and hunt up Mr. Starr, and say to him that on a certain day the Judge of the Federal Court at Fort Smith will want your attendance at a little trial down there wherein you are charged with horse stealing, and you will be kind enough, sir, to put in your attendance on that day; and the Judge sends his compliments to you, Mr. Starr. Is that his mission? Is that the message from this Court that is to be handed to Mr. Starr upon a silver platter with all the formalities of polite society? Is that what Floyd Wilson was employed or engaged to do?"

And the Court, answering its own question, thunders: "No; this Court did not have anything to do with that command; it does not go in the name of the Court; it goes in the name of the *Chief Executive Officer, the President* of the United States." As if the fact that the writ was in the name of the President, whether it be *solemn* or not, had anything to do with the law of the case, except to inflame the minds of the jury againt the poor, haggard, trembling Indian boy, who sat listening to these terrible phillippics.

The sarcasm of this part of the charge was exquisite. Had it been a Demosthenes against a Phillip; a private citizen hurling denunciation against the aggression of a tyrant king; the irony would have been

sublime; but when it is remembered that the victim of this sarcasm was an Indian boy, nineteen years old, on his trial for his life; that it was uttered by a dignified judge on the bench, presiding in a murder trial and backed by all of the power and dignity of his official position, and that the person against whom this intense sarcasm was directed was the prisoner at the bar of his court on trial, we submit that it cannot be considered legitimate sarcasm but falls to the level of invective.

One has but to read this part of the charge to understand the emphasis that the Court would put on the words, "*Mr.* Starr". "The Judge sends his *compliments* to you, *Mr.* Starr." "Upon a *silver platter*." "Formalities of *polite society*." "Will you be *kind* enough?" "A *little* trial." *President* of the *United States*," and the word "*horse-stealing*." In the estimation of the Court, the jury must be told that the charge against the defendant was "horse-stealing," although the writ, which it read just afterwards, used the milder term, "Larceny." (Tr. p. 155.)

The District Attorney, with a delicacy, and a conception of the duties of his office worthy of his position, had refrained, in his argument, from using the word. There was no necessity that the jury should know, or be reminded of the fact that the writ was founded on a case of alleged "horse-stealing." For the purpose of

the case, the word larceny was just as good, and it was the word used in the writ, but it was not so stinging, it was not so bitter, and it was not as much calculated to enflame the minds of the southwestern farmer, as the word "Horse-stealing." The word gave a zest and a force to the charge that the word murder itself would not have done.

Both of the last named instructions to the jury are assigned as error by the Twenty-sixth and Thirtieth assignments. (Tr. pp 187 and 188)

The Forty-second assignment of error is because the Court erred in saying to the jury:

"You are to see what did occur, what was the final result; see what all the facts and circumstances surrounding the case were, and if you are satisfied beyond a reasonable doubt that the condition is established that, under the definition that I have given you, is murder, your duty is to say so, because if that does exist it is not only the life of Floyd Wilson that has been taken, but it is the power of the law that has been set at defiance, and although the taking of the life of Floyd Wilson in a murderous and wicked way *is a great and high crime, the crime of setting at defiance the law of this country, which protects every good citizen, and it is even a higher crime than the loss of that citizen's life. (Tr. pp. 63and64.)*

What does the Court mean by saying that "The

taking of Floyd Wilson's life in a murderous and wicked way," in other words, murder "Is not so high a crime as setting the laws of this country at defiance?"

Does he mean to say that forfeiting a bail bond and evading arrest, is a greater crime than the murder of an officer? That is evidently what the court means.

If it does not mean that, it is meaningless. Surely the Court was not hinting at the other crimes with which the defendant was charged in this court. But it is not the law. Forfeiting bail bonds, evading arrest and such crimes are not comparable with the crime of murder. In this instruction the jury are given to understand that if they believe that the defendant "Was setting the law of this Court at defiance, even if he was not guilty of the murder of Floyd Wilson, that h[illegible] is guilty of a greater crime, and therefore they could logically reason that if a mistake was made in his conviction, and execution for murder, it would make but little difference, because the Court had told them that other crimes, of which they might believe the defendant guilty, to-wit: "Setting the laws of this country at defiance," was greater than the crime of murder, and therefore deserving of the death penalty. Such unfounded and unwarranted instructions can only have the effect to bring the jury up to a conviction, to make them less careful and more negli-

gent in requiring sufficient evidence to convict in a murder case. We contend that this instruction was reversable error.

The forty-fifth assignment of error is as follows:

"Forty-fifth. Because the court erred in instructing the jury as follows:" "I say to you in conclusion, as the law says to you, because I am only its mouth piece—I do not make any law; it is all given to me here to declare to you, and you take it as I declare it; you find the truth and make your application of that principle to the truih—after you have heard the law as I have given it to you, and the evidence as coming from the witnesses if you are satisfied, as twelve intelligent, dispassionate citizens, sitting here ministering at the alter of justice, in its temple, you are able to say beyond a reasonable doubt that this defendant is guilty of having committed the crime of murder, your duty as men, and as citizens, and jurors, is to say so, because, when you are doing that you are but upholding the dignity, the power, and supremacy of this protecting aegis,, which is our only safeguard, our only protection, and that by which the rights of the citizens are protected by its enforcement, by judicious, proper, faithful, and *brave officers*. *Without these officers what is the use of this Court? It takes men who are brave to uphold the law here. I say because of this. and because there is no protection unless the law is upheld by men of*

this kind, if it be true that you are satisfied of the fact *beyond a reasonable doubt* that *Floyd Wilson was a man of this kind*, that he was properly in the execution of the high duty devolving upon him, and while properly executing it by the light of these principles of the law I have given you his life was taken by this defendant, your solemn duty would be to say that he was guilty of the crime of murder, because if the law has been violated it is to be vindicated; *you are to stand by the nation*; you are to *say to all the people that no man can trample upon the law wickedly, violently and ruthlessly;* that it must be upheld if it has been violated." (Tr. pp. 69, 70.)

In this instruction the jury are told that it takes brave men to "Uphold the law here," and because there is no protection unless the law is upheld by men of this kind. They are to find whether *Floyd Wilson* was a *brave man*, and if they find that *fact to be true beyond a reasonable doubt* and the further fact that he was properly "Executing the high duty devolving upon him, and while so doing his life was taken by the defendant, they were to convict."

We here pause to inquire why it is that the jury are to inquire as to the bravery of Floyd Wilson? What has that thing to do with the case? When they have found the fact beyond a reasonable doubt why are they to use it against the defendant in arriving at

their verdict? Suppose they were to find that he were not a brave man; are they to acquit?

May we kill cowards with impunity? Does the law only throw its protection over the brave? The Court makes a difference, the law does not. In this instruction if the jury find the deceased to have been a brave man they are to view the case differently than if they should find the reverse. We submit that the instruction was error.

Again, we think that the exortation of the Court to the jury that they are to "stand by the Nation;" that they are to say to all the people, that no man can trample upon the law wickedly, violently and ruthlessly, and that it must be upheld, if it has been violated," was error. We believe that it is just as much the duty of jurors to uphold the law, when it has not been violated as when it has. That the protection of the innocent against false accusation and undue zeal on the part of the prosecuting officers, is as much a duty as the conviction of the guilty.

The instruction, if not otherwise faulty, would have stated the law at the end of the word murder. There was no necessity of the urgent appeal.

On line with the above, we specially call the Court's attention, without argument, to the following assignments of errors, to-wit: (No. 22, Tr. p. 136-.No. 27, Tr. p. 198--No. 43, Tr. p. 202--and No. 44, 202. Tr.)

The Court could not even give the law of reasonable doubt without reminding the jury that they "owed a duty to the law, to their country, the defendant and the *dead*." (Tr. p. 167.) What ~~debt~~ duty the jury owed to the dead, except, right or wrong, to hang the man who killed him, the Court did not say; nor did it refer to any authorities on that subject.

In speaking of the faulty writ, without a seal and without the proper official designation of the officer who issued it, the jury are three times told that its command was in the name of the "President of the United States;" that it "commanded them (the officers) in the *solemn* name of the *President* of the United States to execute these processes." (Tr. p. 152.)

"The *President* of the United States commands him [the deceased] to execute that paper." [Tr. p 156.] And, "This Court did not have anything to do with this command, it does not go in the name of this Court, it goes in the name of the chief executive officer, the *President* of the United States. [Tr. p. 155.]

Thus the great name of the President is made a blanket to cover the faults of a defective writ and is used, we think, to unduly exalt and magnify the position and importance of the deceased.

Besides we know of no law requiring a warrant of arrest to be in the name of the President. It is true that in England they go in the name of the King, but

in the United States it has been customary, we think, that they go in the name of the Commonwealth, or of the State. And Roe, in his work on Criminal Procedure, in his form of a warrant of arrest, page 118, nowhere uses the word President, but uses the following:—"The *United States* of *America* to the Marshal," etc., and "Now, therefore, you are hereby commanded, in the name of the *United States* of *America*, to apprehend," etc., and he requires an official seal and has it signed by

....

"Commissioner of the Circuit Court."

[Official Seal] District of————————

[In Roe's Criminal Procedure, p. 118.]

On the whole case, we respectfully submit that, in addition to the errors pointed out, the action of the Court in empanneling the jury, in the admission of evidence, and more especially in the charge, is open to the criticism of undue zeal and partisanship as against the defendant. These things cannot be pointed out in a single exception, they go to the whole charge, and to every part of it.

The deceased was held up as a brave man, and the dignity and importance of his official position highly extolled, if not exaggerated. The government witnesses were bolstered up before the jury (Tr. p. 164, 182, 162 and 164.) The duty of the jury to convict,

we think, was pressed upon them with undue ardor and repetition. The duty of enforcing the law by conviction, and its power and grandeur; that "it was made by the people and for the people," and that it was the "aegis of our protection;" that it was that which "protected our rooftree and family alters;" that it walked in gradeur and majesty through the land;" that the jury "must stand by the Nation;" that officers are "the manifest spirit and the voice of the law." [Tr. p. 163.] and many other platitudes were skillfully used with powerful force and effect to enthuse the jury and work them up to a pitch of zeal against violated law, so that they would convict. While on the other hand, the law favorable to innocence and to the defendant was never given, save with an "if" or a "but." That part of the law which was against him was repeated until iteration and reiteration made it appear as if the assumed facts upon which it was founded were established or conceded. Even the instructions which were asked for by the defendant, which were given, were nullified by oft repeated "provided," etc," [Tr. pp. 130, 131 and 132.] The defendant himself, was held up to contumely and scorn, and subjected to ridicule and withering sarcasm. (Tr. p. 155.) Even his counsel did not escape. The jury was substantially told that their arguments were falacious; (Tr. p. 182 and 164.) that they, (the jury must judge

"whether the rule invoked *by argument in defense* * * * was the law or whether it is to be found in this great compact in the shape of the laws," etc. (Tr. 152.) That their efforts in the defendants behalf in pointing out the unreliability of the prosecuting witnesses was an act of "*immorality*" and not "*good law.*' (Tr. 164.) Even what little wit they possessed was turned into "jests and sneers" by the Court. [Tr. p. 164.] The jury retired with this eloquent charge, delivered with all of the earnestness, impressiveness and rhetorical powers of which the distinguished Judge was capable, ringing in their ears; and after being out a short time, returned into the court with the following verdict, to-wit: "We, the jury, find the defendant Henry Starr, *guilty of murder* as charged in the indictment." Is it strange that such a verdict should be returned?

We submit that this Indian boy did not have that fair and impartial trial which is guaranteed to him by the Constitution and laws of our country, and ask that for the errors pointed out, that the judgment of the Circuit Court be reversed.

Respectfully Submitted,

A. H. GARLAND,

Attorney for Plaintiff in Error.

In several cases from the court in which this case was tried, this court at the present term, has had occasion, more in sorrow than in anger, to remind the excellent judge who presides in that court, that abstract disquisitions on law and morals are not in place in such cases as this, and are not to

be encouraged or tolerated, as they are misleading and confusing to the jury, and be unfair and unjust to the accused. The habit of thus indulging in irrelevant rhetoric seems to have become chronic with the judge there, and from this case it looks like it is on the increase, and certainly if the complaint by this court was well founded in the previous cases alluded to, in this case as appears from the foregoing statement it is enlarged and inflamed and the case deserves reversal for this if nothing else: 150 U.S. 76; 21 L. 118; 21 L. 442; 151 U.S. 50; 14 L. 303;

I send the foregoing printed brief now prepared by counsel at Ft. Smith ark. who are not attorneys of this court, but I have permitted my name to be used by them in presenting it, adding, in manuscript myself some authorities thereto.

Respectfully

A.H. Garland

MAR 14 1894
JAMES H. McKENNEY,
CLERK.

153-614

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

HENRY STARR, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 1080.

BRIEF FOR THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

HENRY STARR, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 1080.

At the August term, 1893, of the U. S. district court of the western district of Arkansas, Henry Starr was indicted for the murder of Floyd Wilson, a white man and not an Indian, on the 13th of December, 1892, at the Cherokee Nation, in the Indian Territory, and on the 20th of October, 1893, he was convicted and found guilty of murder as charged in the indictment, and sentenced to be hung on the 20th of February, 1894.

THE FACTS.

On the 18th of November, 1892, a warrant was issued by a U. S. commissioner for the western district of Arkansas for the arrest of Henry Starr and others on a charge of larceny; and this warrant was delivered for execution to Henry C. Dickey, a deputy U. S. marshal (p. 16).

On proceeding to execute the warrant the marshal summoned Floyd Wilson, the deceased, as his posse. They proceeded on horseback to the neighborhood where they were informed that Starr, the plaintiff in error, would probably be found, and after visiting several points finally came to the house of Arthur Dodge. There was no one in the house at the time except Dodge, his housekeeper, and his children. Starr, the plaintiff in error, who the marshal had been directed to arrest, passed Dodge's house on horseback. Wilson, the deceased, mounted his horse and pursued him.

The horse of the marshal proved refractory and prevented his accompanying Wilson and delayed him in the pursuit. When the marshal got within 100 yards (p. 30) Starr and Wilson appeared to him to be 60 or 80 feet apart from each other. They were on foot, standing still. Each appeared to be holding his bridle rein over his arm. They appeared to be talking. In a minute, or a second or two, Wilson threw his gun to his shoulder and fired. The marshal could not tell whether Wilson was shooting to get Starr's horse or not. Starr was standing with his gun in both hands, holding it down. About a second after Wilson fired Starr returned the fire. Starr fired at him again, and continued to fire rapidly.

After the second shot Wilson fell. He raised up in a sitting position and jerked his six-shooter out, and fired four times. Starr then ran up on Wilson and stood over him and fired point blank into him. During the time, Starr fired one shot at the marshal. Starr picked up Wilson's gun, found the lever out of order, and could not

fire it, and turned to go away; as he turned the marshal fired at him. The marshal's horse had thrown him and had then run away. Starr's horse also had run away. Starr ran and caught Wilson's horse, mounted it and rode off. Wilson was shot through the bowels, and in several other places, and died almost immediately (pp. 25–30, 4[illegible], 58–74).

At the time of this occurrence the marshal had the writ in his possession (p. 48) and had instructed Floyd Wilson, after he had summoned him as a posse, as to his duty, saying to him: "Now, don't kill this boy if possible to get along without it; we will call on him to surrender" (p. 51).

Starr was fully aware that the marshal was looking for him, with a warrant for his arrest (p. 55).

Many other circumstances connected with the killing are testified to by other witnesses; they are substantially to the same effect.

ASSIGNMENTS OF ERROR.

These are forty-six in number and will be found between pages 191 and 203. *Phillips, &c.* v. *Seymour et al.*, 91 U. S., 648.

Several of these assignments are considered and disposed of in the opinion of Judge Parker overruling the motion for a new trial (pp. 183-190).

1. Because the court excused certain persons from the jury.

The proceedings will be found pages 7-11, from which it appears that the three persons so excused had declared

their unwillingness to inflict capital punishment in any case depending in whole or part upon circumstantial evidence. I refer to what Judge Parker says in vindication of his ruling (pp. 183–184). (*Logan* v. *United States*, 144 U. S., 298.)

2. Because the court overruled defendant's objection to Edward Taylor as a qualified juror. Taylor's examination on his *voir dire* appears on pp. 11–12, from which it will be seen that he had read the newspaper accounts of this affair about the time of its occurrence and had formed and expressed an opinion based upon those accounts. He said (p. 13):

> I would have to hear facts in the case as a juror to be changed in my mind as to what the papers said about it.

He said that his opinion was not of such a character as to influence or bias his judgment in the least, after he had heard the law and the evidence; that he would be controlled exclusively by the law and the evidence.

In the case of *Spies* v. *Illinois* (123 U. S., 179) this court, citing *Reynolds* v. *United States* (98 U. S., 145–156), said:

> The question thus presented is one of mixed law and fact and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court unless the error is manifest. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial.

> The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court.

Tried by this test, in the light of the testimony of this juror, it is clear that the ruling of the court should not be condemned and reversed.

3. Because the court admitted in evidence the warrant of arrest for Starr, the plaintiff in error, which the United States marshal and the deceased, as his posse, were attempting to execute at the time of the homicide. The proceedings will be found pp. 16–19.

The objection to the introduction of the warrant, so far as it is disclosed, appears to rest upon the ground that the warrant was not under seal.

Section 911, Revised Statutes, provides:

> That all writs and processes, issuing from the courts of the United States, shall be under the seal of the court from which they issue and shall be signed by the clerk thereof.

But there is no requirement, by statute or otherwise, for a seal to be attached to a process issued by a commissioner of the United States court.

Section 1014, Revised Statutes, provides:

> That for any crime or offense against the United States the offender may, by any commissioner * * * where he may be found, and agreeably to the usual mode of process against offenders in such state, be arrested and imprisoned. * * *

It does not appear in evidence here that by the laws of the State of Arkansas a seal is required to a warrant of arrest.

4. Because the court erred in permitting the district attorney, in the examination of Arthur Dodge, a witness called for the Government, to repeat to the witness certain statements and ask him if those statements had not been made. The proceeding will be found on page 64.

The objection rested on the ground that the question was leading; it was overruled by the court and the question allowed, on the ground that it was intended only to refresh the memory of the witness. It will be seen that the witness was subjected to a very lengthy examination; had been repeatedly asked to state all that occurred and all that had been said. He was evidently an uncultivated man and dull of comprehension.

In Greenleaf on Evidence (15 ed., sec. 435), speaking of the exceptions to the rule forbidding leading questions, it is said:

> In some cases, however, leading questions are permitted even in a direct examination, * * * where, from the nature of the case, the mind of the witness can not be directed to the subject of inquiry without a particular specification of it. * * * So, where a witness is called to contradict another who had stated that such and such expressions were used or the like, counsel are sometimes permitted to ask whether those particular expressions were used or those things said, instead of asking the witness to state what was said.

Necessarily very much must be left to the discretion of the judge presiding at the trial. (*Moody* v. *Rowell*, 17 Pick., 498; Wharton's Crim. Ev., 8 ed., sec. 454*a*.)

5, 6, 7.

These relate to the refusal of the court to give certain instructions asked for by defendant and to giving certain of these with modifications. They will be found on pp. 130, 131.

The court refused to give the first instruction, doubtless because it was not relevant to any evidence in the case. There was nothing tending to show that the person attempting to make the arrest acted in a wanton or menacing manner.

Mrs. Padget (p. 88) witnessed the affair, and she understood Wilson to say to Sparr, before the shooting began, "Hold up! I have a warrant for you." And she thought she heard Starr say, "You hold up."

There is no evidence tending to show that Wilson threatened or in any manner repelled Starr, and the instruction would therefore have been misleading. (1 Am. and Eng. Ency. of Law, p. 733, and cases cited.)

To the second instruction the court added the words, "provided the defendant was neither fleeing nor preparing to flee, by standing the officer off by acts of threatened violence."

The instruction, as offered, assumed as a fact in the case what the court by its modification left to the jury to determine, to wit: whether the defendant was fleeing or preparing to flee or not.

The third instruction, as offered, was manifestly wrong for the same reason in assuming that the defendant had no reasonable ground to know the character of the officer who was seeking to arrest him; and the modification added by the court states what must be recognized as a correct expression of the law—that is, that where one whose

arrest is attempted under a warrant prevents by his threatening and violent conduct the officer from approaching him so as to make his character and mission known, and obstructs the arrest by a display of deadly weapons, that the officer is bound to employ force sufficient to overcome the resistance offered and execute the warrant. (2 Bish. Crim. Law, sec. 647, *et seq.*; *U. S.* v. *Rice*, 1 Hugh, 560; *Carr* v. *State*, 43 Ark., 99; *Wolf* v. *State*, 18 Ohio, 248; *Commonwealth* v. *Brooks*, 61 Penn., 352; *Pond* v. *People*, 8 Mich., 150; *State* v. *Green*, 66 Mo., 631.)

The fourth instruction was refused because it states the law to be that it is necessary to a lawful arrest that the person sought to be arrested should have notice of the authority by which the arrest is made.

This excludes altogether the material element of one's refusing to allow himself to be notified.

But the evidence here is that Starr was notified, and only by the display of hostile force did he prevent the officer from approaching near enough to him to show the warrant.

But all of these matters will be found to have been adequately stated in the charge of the court to the jury.

8 to 46.

All of these assignments are to certain extracts from the charge of the court as delivered. And as to this it is only proper to suggest that the charge of the court should be read as a whole in order to ascertain how far it presents a correct exposition of the law governing the case.

The method pursued by the judge who presided at this trial appears to have been to state to the jury, not the

mere propositions of law bearing upon the case, but to have gone further and to have expounded the principles of law, with the reasons therefor, presenting with great fullness and abundant illustration the arguments for and against the propositions announced by him.

It is, therefore, manifestly proper that the extracts presented in these assignments of error should be read in connection with their context.

In *N. Y. & L. E. & W. R. Co.* v. *Estill* (147 U. S., 614) this court said that detached sentences in a charge to a jury can not be selected as grounds of objection, but must be read in connection with the whole charge.

And in *Erie R. R. Co.* v. *Winter* (143 U. S., 75), where the trial court has in its general charge given the substance of instructions requested, there is no error in refusing to give them in the language requested.

The *first* instruction announces the simple proposition, that if the defendant was not guilty the law protected him from punishment, and that if he was guilty it did not protect him.

The *second*, that if the deceased was right in the method he adopted he was justified in shooting at the defendant under the law of self-defense.

The *third*, that the defense set up by the defendant assumed that Wilson was dead and that he died at the hands of the defendant. This was not offered as a substitute for evidence of killing, for that was abundantly proven by nearly all the witnesses.

The *fourth*, *fifth*, and *sixth* are correct, although somewhat redundant, definitions of *intent*, as the *seventh*, *eighth*,

and *ninth* are of *willfully* and the *eleventh* and *twelfth* are of *maliciously*.

The *thirteenth* is a very exuberant and, perhaps, eloquent statement of premeditation, intended, doubtless, to prevent reliance on the popular notion, which involves the idea of a great lapse of time.

And the *fourteenth* is a rather acute, but accurate, statement of the mental operation experienced under the condition stated.

He states: "The thought to kill must be contemplated beforehand, yet the contemplation of it may be contemporaneous with the execution of that thought," which is merely saying that the intention which precedes the act is never in abeyance, but abides throughout until the act is consummated.

The *fifteenth* and *sixteenth* give a definition of malice with an illustration drawn from a hypothetical statement of this case.

The *seventeenth* states that if a man who is conscious that his arrest by lawful warrant is sought resolves to resist arrest by the exercise of force, and does slay the officer who attempts his arrest, that he is guilty of murder, although he may have had no criminal intent as to the particular individual who seeks to arrest him.

The *eighteenth*, *nineteenth*, and *twentieth* define and illustrate what is meant by premeditation.

The *twenty-first* is immaterial, as it states no specific ground of error.

The *twenty-second* states that everyone has a right to rely upon the law as his protection, and the duty of the

jruy is to ascertain whether, if at all, the defendant has violated this right. The offense is charged "against the peace and dignity of the United States."

The *twenty-third* states that after a man has prepared himself for war, and in the war he slays another, the previous preparation repels the notion of self-defense.

The *twenty-fourth* states the elements of self-defense; and, among these, that the defendant must show that he has "retreated to the wall before he took life."

The *twenty-fifth* states that if Wilson was engaged in the discharge of a lawful duty, he had no right to kill Starr until he had exhausted the reasonable means of otherwise executing his warrant.

The *twenty-sixth*, that the law of self-defense belonged to Wilson as well as to the defendant; and it defines that right as to each of these parties under the conditions of this case.

The *twenty-seventh* defines manslaughter and declines to state whether this case is one of murder or manslaughter.

The *twenty-eighth* states that the officer, when attempting to execute his warrant, was justified in inferring, from the exhibition of arms by the defendant and the demonstrations made with them, that the defendant intended to repel the officer by force.

The *twenty-ninth* is as to the power and authority of Wilson to act under Dickey's orders. (*Deistrich* v. *Show*, 43 Ind., 175; *Mitchell* v. *State*, 12 Ark., 50; 54 Am. Dec., 253.)

The *thirtieth* and *thirty-first* are to the same effect.

The *thirty-second* announces that it is not necessary for an officer or his deputy to make known their individual

names to the person they are authorized to arrest, but are required only to state that they are officers charged with this arrest and to produce their warrant if required.

The *thirty-third*, *thirty-fourth*, *thirty-fifth*, *thirty-sixth* and *thirty-seventh* state the rights and powers and duties of an officer, armed with a lawful warrant, in his attempt to execute it, especially as to his power to overcome resistance and prevent the escape of the accused.

That the officer, with or without a warrant, may arrest a felon. (20 Am. Dec., 702; 1 Am. and Eng. Ency., 733.)

Thirty-eighth. The officer has a right to proceed even to the extent of taking life where the accused resists his authority, repels the officer, and threatens him by a display of dangerous weapons.

Fortieth and *forty-first.* It is true that where the process is sought to be obstructed or impeded and the officer is hindered in the execution of it by violence of a deadly character, he is authorized to overcome it by the death of the accused if the offense charged is a felony and all other means of executing the warrant have been exhausted.

Forty-second calls attention of the jury to the fact that the prisoner is charged not merely with taking the life of Wilson, but of setting at defiance the law of the country, which is the sole dependence of the citizen.

Forty-third, that the testimony of the witness should depend upon its own merit, its reasonableness, its consistency, its probability, and should not be weakened by any prejudice that may exist or be excited against the official position which he holds.

Forty-fourth, and so the testimony of any witness should be waived and the jury should not allow itself to be affected by sheer abuse unsupported by evidence.

Forty-fifth and *forty-sixth*, as to the reasonable doubt and as to the duty of the jury to execute the law fearlessly and to do their duty.

HOLMES CONRAD,
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